Supreme Court, U.S.
FILED

991417 FEB 24 2000

No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

STATE OF CALIFORNIA,
DEPARTMENT OF MOTOR VEHICLES,

Petitioner,

v.

WILLIAM ROBERT DARE AND GARY PETILLO,
individually and on behalf of
others similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
California Attorney General
DAVID CHANEY
Senior Assistant Attorney General
SILVIA M. DIAZ
Supervising Deputy Attorney General
ANGELA SIERRA*
Deputy Attorney General
California Department of Justice
300 South Spring Street
Los Angeles, California 90013
Telephone: (213) 897-2152

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. DID CONGRESS VALIDLY ABROGATE THE ELEVENTH AMENDMENT IMMUNITY WHEN, PURSUANT TO THE AMERICANS WITH DISABILITIES ACT ["ADA"], IT PROHIBITED STATES FROM ASSESSING *DE MINIMIS* SURCHARGES TO PARTIALLY DEFRAY COSTS OF STATE PROGRAMS WHICH BENEFIT THE DISABLED?

2. DOES AN APPLICATION FEE FOR DISABILITY PARKING PLACARDS FOR PREFERENTIAL PARKING SPACES CONSTITUTE FACIAL DISCRIMINATION UNDER THE ADA, EVEN THOUGH THE SPACES ARE NOT AVAILABLE TO THE NON-DISABLED?

3. DOES THE ADA PROHIBIT STATES FROM CHARGING *DE MINIMIS* FEES FOR DISABILITY PARKING PLACARDS TO PARTIALLY OFFSET THE COSTS OF MAINTAINING A PLACARD PROGRAM, EVEN THOUGH THE PROGRAM IS NOT REQUIRED BY THE ADA?

PARTIES TO THE PROCEEDINGS

Petitioner the State of California, Department of Motor Vehicles is an administrative entity under the aegis of the State of California and prays that a Writ of Certiorari issue to review the Opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 16, 1999.

Respondents are William Robert Dare ("Dare") and Gary Petillo ("Petillo"), on behalf of themselves and all persons who are disabled individuals as defined by the ADA who have purchased distinguishing disability parking placards issued pursuant to California Vehicle Code § 22511.55 since January 26, 1992, and/or who will in future be required to purchase such placards.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES viii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

A. INTRODUCTION 5

B. OVERVIEW OF THE STATE OF CALIFORNIA'S DISABILITY PARKING PROGRAM 7

C. THE NINTH CIRCUIT ERRONEOUSLY CONCLUDED THAT THE PURPORTED PROHIBITION AGAINST NOMINAL SURCHARGES WAS NOT IN EXCESS OF CONGRESS' POWERS PURSUANT TO SECTION 5 OF THE FOURTEENTH AMENDMENT 9

i. The Ninth Circuit's Opinion Creates A Circuit Split On A Substantial Constitutional Question 9

ii. The ADA's Sweeping Prohibition Against Fees Is Not Appropriate Legislation Under Section 5 Of The Fourteenth Amendment .. 11

TABLE OF CONTENTS – Continued

Page

D. THE NINTH CIRCUIT'S DECISION THAT THE PLACARD APPLICATION FEE CONSTITUTES FACIAL DISCRIMINATION IS ERRONEOUS AS A MATTER OF LAW 17

E. THE NINTH CIRCUIT MISAPPREHENDS AN ISSUE OF NATIONAL IMPORTANCE IN DETERMINING THAT PLACARD FEES ARE A "SURCHARGE" UNDER THE ADA: THIS HOLDING IS CONTRARY TO FEDERAL LAW EXPRESSING ASSENT TO SUCH FEES 19

CONCLUSION 23

APPENDIX:

Dare v. State of California, 191 F.3d 1167 (9th Cir. 1999) .....App. 1

United States District Court, Case No. 96-5569 LEW(ANx), Class Action Complaint Filed on August 13, 1996 .....App. 30

United States District Court, Case No. CV96-5569 JSL, Partial Summary Judgment, Filed on May 30, 1997 .....App. 45

United States District Court, Case No. CV96-5569 (ANx), Notice of Motion and Motion for Partial Summary Judgment .....App. 125

U.S. Court of Appeal for the Ninth Circuit – Order denying petition for rehearing and suggestion for rehearing en banc filed on October 27, 1999 .....App. 54

Letter dated January 18, 2000 from William K. Suter, Clerk of the U.S. Supreme Court granting extension of time within which to file a petition for Writ of Certiorari to and including February 24, 2000 .....App. 55

TABLE OF CONTENTS – Continued

Page

42 U.S.C.

§ 12101 ..... App. 58

§ 12131 ..... App. 61

§ 12132 ..... App. 62

§ 12133 ..... App. 62

§ 12134 ..... App. 62

Public Law 100-641 § 3 ..... App. 57

23 C.F.R. Part 1235 et seq. ..... App. 64

28 C.F.R.

§ 35.150 ..... App. 70

§ 35.151 ..... App. 74

28 C.F.R. Part 36, App. A, § 4.1.2, 4.6 ..... App. 76

28 C.F.R. Part 36, App. A, § 4.6 ..... App. 78

Cal. Civil Code

§§ 54 et seq ..... App. 80

Cal. Govt. Code

§§ 11135 et seq ..... App. 96

§ 12940 ..... App. 99

§ 12955 ..... App. 106

Cal. Vehicle Code

§ 4461 ..... App. 110

§ 4463(d) ..... App. 111

§ 5007 ..... App. 111

TABLE OF CONTENTS – Continued

Page

§ 9250.1(a)(b) ..... App. 113
§ 22507.8 ..... App. 113
§ 22507.9 ..... App. 114
§ 22511.5 ..... App. 116
§ 22511.7 ..... App. 117
§ 22511.8 ..... App. 118
§ 22511.10 ..... App. 119
§ 22511.11 ..... App. 119
§ 22511.55 ..... App. 120
§ 22511.56 ..... App. 123
§ 22511.57 ..... App. 123
§ 42001.5 ..... App. 124
Cal. Stats. of 1959, Ch. 716 ..... App. 79

TABLE OF AUTHORITIES

Page

CASES

Alden v. Maine, 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999) 9

Alexander v. Choate, 469 U.S. 287, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985) 7, 14, 17, 18, 19, 22

Alsbrook v. Arkansas, 120 S.Ct. 1003, 2000 U.S. Lexis 996 (January 25, 2000) 5, 6

Baldwin v. Montana Fish & Game Comm., 436 U.S. 371, 56 L.Ed.2d 354, 98 S.Ct. 1852 (1978) 16

Borkowski v. Valley Cent. School Dist., 63 F.3d 131 (2nd Cir. 1995) 15

Brockett v. Spokane Arcades Inc., 472 U.S. 491, 86 L.Ed.2d 394, 105 S.Ct. 2794 (1985) 11

Brown v. North Carolina Div. of Motor Vehicles, 166 F.3d 698 (4th. Cir. 1999) 3, 4, 10, 11, 16

City of Boerne v. P.F. Flores ("City of Boerne") 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1996) 12

City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985).. 13, 15, 18

Clark v. California, 123 F.3d 1267 (9th Cir. 1997.) 11

Coolbaugh v. Louisiana, 136 F.3d 430 (5th Cir. 1998), *cert. denied*, 525 U.S. 819, 142 L.Ed.2d 45, 119 S.Ct. 58 (1998) 13

Crowder v. Kitigawa, 81 F.3d 1480 (9th Cir. 1996)...7, 14

Dare v. State of California, 191 F.3d 1167 (9th Cir. 1999) ..... *passim*

Duprey v. State of Connecticut, 28 F. Supp. 2d 702 (D.C. Conn. 1998) 4

TABLE OF AUTHORITIES – Continued

Page

Gamble v. City of Escondido, 104 F.3d 300 (9th Cir. 1997) 13

Hawaii Boating Ass'n v. Water Transp. Facilities, 651 F.2d 661 (9th Cir. 1981) 16

Hedgepeth v. State of Tennessee, 33 F. Supp. 2d 668 (W.D. Tenn. 1998) 3

Heller v. Doe by Doe, 509 U.S. 312, 125 L.Ed.2d 257, 113 S.Ct. 2637 (1993) 14

Hexom v. Oregon DOT, 177 F.3d 1134 (9th Cir. 1999) 4

Howell v. The State Board of Equalization, 731 F.2d 624 (9th Cir. 1984), *cert. denied*, 469 U.S. 933, 83 L.Ed.2d 266, 105 S.Ct. 330 (1984) 16

Hunsaker v. Contra Costa County, 149 F.3d 1041 (9th Cir. 1998) 7, 16, 17, 19

Kilcullen v. New York State Department, 33 F. Supp. 2d 133 (N.D.N.Y. 1999) 16

Kimel v. Florida Board of Regents, ___ U.S. ___, 120 S.Ct. 631, 145 L.Ed.2d 522, 2000 U.S. Lexis 498 (2000) ..... *passim*

Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration, 113 U.S. 33 (1885) 11

Lussier v. Dugger, 904 F.2d 661 (11th Cir. 1990) 13

Lussier v. State of Florida, 972 F. Supp. 1412 (M.D. Fla. 1997) 4

Marcus v. State of Kansas, 170 F.3d 1305 (10th Cir. 1997) 4

TABLE OF AUTHORITIES – Continued

Page

McGarry v. Director, Dept. of Revenue, 7 F. Supp. 2d 1022 (W.D. Mo. 1998) 4

Morton v. Mancari, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974) 21

Muller v. Costello, 187 F.3d 298 (2nd Cir. 1999) 16

Plyer v. Doe, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) 18

Seminole Tribe v. Florida, 517 U.S. 44, 134 L.Ed.2d 252, 116 S.Ct. 1114 (1996) 9

Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984) 21

Thompson v. Colorado, 29 F. Supp. 2d 1226 (D.Colo. 1998) 4

Thrope v. State of Ohio, 19 F. Supp. 2d 816 (S.D. Ohio 1998) 4

United States v. Raines, 362 U.S. 17 (1960) 11

Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976) 14

Washington v. Seattle School Dist. No. 1, 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982) 14

Welsh v. City of Tulsa, Okl., 977 F.2d 1415 (10th Cir. 1992) 15

CONSTITUTIONS

United States Constitution, XI Amendment 2, 4, 12

United States Constitution, XIV Amendment ... 2, 5, 12, 17

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

28 U.S.C.
§ 1254(1) 1
§ 2403(a) 1
29 U.S.C.
§ 794 22
42 U.S.C.
§ 12101(b)(4) 12
§ 12132 ..... 2, 6, 22
Public Law 100-641 § 3 ..... 20, 21
Section 504 of the Rehabilitation Act 22

FEDERAL REGULATIONS

23 C.F.R. Part 1235 20
28 C.F.R.
§ 35.130(f) 2, 6, 10, 19, 20
§ 35.150 6
§ 35.150(b) 19
§ 35.151 6
§ 35.151(c) 19
28 C.F.R. Part 36, App. A, 4.1.2, 4.6 ..... 6, 19

STATE STATUTES

Cal. Civil Code
§§ 54 et seq. 7
Cal. Govt. Code
§§ 11135 et seq. 7
§ 12940 7
§ 12955 7

TABLE OF AUTHORITIES – Continued

Page

Cal. Vehicle Code

§ 4461 8

§ 4463(d) 8

§ 5007(a) 8

§ 9250.1(a)(b) 8

§ 22155.8 7

§ 22507.8 8

§ 22507.9 8

§ 22511.5 9

§ 22511.7 7

§ 22511.8 8

§ 22511.55 8

§ 22511.55(a)(2)(A) 8

§ 22511.55(a)(3) 8

§ 22511.56 8

§ 22511.57 8

§ 42001.5 8

Cal. Stats. of 1959, Ch. 716 7

OTHERS

Federal Register Vol. 56 No. 47, Appendix C to the Preamble Committee Report, at p. 10344 21

Senate Comm. On Labor and Human Resources, S. Rep. No. 116, 101st Cong., 1st Sess., at 44, 45 (1989) 22

OPINIONS BELOW

The Opinion of the Court of Appeals for the Ninth Circuit, filed on September 16, 1999, is reported at 191 F.3d 1167 and is reprinted herein, commencing at Appendix ["Appendix" and/or "App."] 1. Petitioner timely filed a petition for rehearing and suggestion for rehearing en banc on September 30, 1999. On October 27, 1999, the Ninth Circuit issued an Order denying the petition for rehearing and rejecting the suggestion for rehearing en banc. The Ninth Circuit's October 27, 1999, Order is reproduced at Appendix 54.

JURISDICTION

On January 18, 2000, the Supreme Court granted an extension for the filing of a petition for a writ of certiorari in this case to and including February 24, 2000. The Supreme Court's January 18, 2000, Order is reproduced at Appendix 55.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Given the Eleventh Amendment question presented in this petition, 28 U.S.C. § 2403(a) may apply. Copies of the within petition for writ of certiorari is therefore being served on the Solicitor General of the United States. The General Docket for the Court of Appeals for the Ninth Circuit reflects that on December 18, 1997, the Ninth Circuit served the United States Attorney for the Central District of California notice that the appeal drew into question the constitutionality of 42 U.S.C. § 12132.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment of the United States Constitution states:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

The Fourteenth Amendment of the United States Constitution provides in pertinent part:

> "Section 1. . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * *
>
> "Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."

Title II of the ADA provides in pertinent part:

> "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

The ADA regulation, 28 C.F.R. § 35.130(f), that is centrally at issue states:

"A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the non-discriminatory treatment required by the Act or this part."

STATEMENT OF THE CASE

The State of California, a forerunner with respect to disability rights, seeks review of the decision of the Court of Appeals which impermissibly curtails a state's discretionary exercise of its police power in implementing a progressive and comprehensive statewide disability parking program simply because the program includes a biennial $6.00 application fee for optional disability parking placards. The Ninth Circuit did so under the misguided notion that the nominal fee which grants the disabled substantial preferential parking rights constitutes "facial discrimination" against the disabled and thus violates the ADA. *Dare v. State of California*, 191 F.3d 1167, 1171 (9th Cir. 1999). (App. 6-7.)

Review of the Ninth Circuit's decision outlawing such a fee is of paramount import. Indeed this precise issue has been and continues to be litigated nationwide.[1]

---

[1] *See, e.g., Brown v. North Carolina Div. of Motor Vehicles*, 166 F.3d 698, 702-10 (4th Cir. 1999). pet. for cert. filed August 8, 1999; *Hedgepeth v. State of Tennessee*, 33 F. Supp. 2d 668, 671-677 (W.D. Tenn. 1998) [Tax Injunction Act and the Eleventh Amendment

Moreover, the Ninth Circuit's decision has created a split among the Circuits on the specific Eleventh Amendment question implicated in this case, which requires resolution by the Supreme Court. *See Brown v. North Carolina Div. of Motor Vehicles, supra,* 166 F.3d 698, 702-10 [forbidding surcharges for disability parking placards exceeds Congress' Section 5 powers].

This class action was commenced on August 13, 1996, by respondents Dare and Petillo, two disabled individuals, who, seeking injunctive relief and reimbursement of placard fees, alleged that California's statutory $6.00 biennial application fee for the issuance and two-year renewal of permanent disability parking placards violates Title II of the ADA. *Dare v. State of California, supra,* 191 F.3d at 1170 (App. 3); *See* Complaint at App. 30.

The district court granted plaintiffs' motion for partial summary judgment as to the class of placard purchasers who are disabled as defined by the ADA and

---

precluded subject matter jurisdiction over plaintiff's ADA challenge to Tennessee's disability parking placard fee]; *Thompson v. Colorado,* 29 F. Supp. 2d 1226, 1231 (D.Colo. 1998) [state's disability parking placard fee violates the ADA]; *Duprey v. State of Connecticut,* 28 F. Supp. 2d 702 (D.C. Conn. 1998) [same]; *Thrope v. State of Ohio,* 19 F. Supp. 2d 816, 824 (S.D. Ohio 1998) [same]; *McGarry v. Director, Dept. of Revenue,* 7 F. Supp. 2d 1022, 1028 (W.D.Mo. 1998) [same]; *See also Hexom v. Oregon DOT,* 177 F.3d 1134 (9th Cir. 1999) [Tax Injunction Act does not apply to plaintiffs' ADA challenge to state's disability parking placard fee]; *Marcus v. State of Kansas,* 170 F.3d 1305, 1312 (10th Cir. 1999) [same]; *Lussier v. State of Florida,* 972 F. Supp. 1412 (M.D. Fla. 1997) [Tax Injunction Act precluded federal court jurisdiction over plaintiff's ADA challenge to state's disability parking placard fee].

issued a permanent injunction prohibiting the State of California from collecting said fee from that class of individuals. *See* (May 30, 1997 District Court Order at App. 45, 125.) *Dare v. State of California, supra,* 191 F.3d 1167, 1176. (App. 19.) The State of California filed an interlocutory appeal. *Dare, supra,* 191 F.3d at 1170. (App. 4.) On September 16, 1999, in a 2-1 published opinion, the Court of Appeals for the Ninth Circuit affirmed the judgment below granting the permanent injunction. *Id.* at 1176. (App. 19.)

REASONS FOR GRANTING THE WRIT

A. INTRODUCTION

This case involves several issues of exceptional national importance. First, in light of the reasoning of the Supreme Court's recent decision in *Kimel v. Florida Board of Regents,* ___ U.S. ___, 120 S.Ct. 631, 145 L.Ed.2d 522, 2000 U.S. Lexis 498 (2000), the Ninth Circuit Panel Majority's conclusion that Congress has not exceeded its powers under Section 5 of the Fourteenth Amendment when prohibiting states from assessing *de minimis* administrative fees to partially defray costs of programs designed for the benefit of the disabled is in error. Whether the ADA was a proper exercise of powers granted to Congress pursuant to Section 5 of the Fourteenth Amendment is the subject of *Alsbrook v. Arkansas,* 120 S.Ct. 1003, 2000 U.S. Lexis 996 (January 25, 2000), a case in which this Court recently granted certiorari. *See* 68 United States Law Week, 3175, 3186 (September 28, 1999).

Alsbrook v. Arkansas, however, which asserts employment discrimination under Title II of the ADA will not necessarily dispose of this case.[2] Specifically, *Alsbrook* may not ultimately entail an examination of Title II's comprehensive physical and program "access" requirements or its prohibition preventing states from assessing nominal administrative fees to cover partially the costs of those requirements.[3]

Consequently, review of the constitutional issue presented in this case will significantly complement the Section 5 issue presented in *Alsbrook*, thereby allowing a more complete discourse regarding Congress' Section 5 powers vis-a-vis the ADA. The State of California respectfully requests that the Supreme Court grant this petition for writ of certiorari on this critical constitutional question, or at a minimum, stay this petition until *Alsbrook* is decided.

The second and third issues posited by the State of California involve the proper interpretation of the ADA when applied to those states that have attempted to provide more access than is required by the ADA, such as, in the instant case, providing a policing mechanism to curb abuse of disability parking spaces where no such police program is mandated, nor even suggested, by the ADA. The Ninth Circuit's opinion, as it now stands, creates a

---

[2] *Alsbrook v. Arkansas*, 184 F.3d 999, 1002-1003 (8th Cir. 1999), *cert. granted*, 120 S.Ct. 1003 (January 25, 2000).

[3] *See, e.g.*, 42 U.S.C. section 12132; 28 C.F.R. sections 35.130(f), 35.150, 35.151; and Appendix A to 28 C.F.R. Part 36, 4.1.2., 4.6. These statutory provisions and regulations are set forth at App. 62, 70, 74, 76-78 and at pages 2-3, *supra*.

serious disincentive to states that seek to implement progressive programs that exceed the ADA's requirements.

Moreover, unless reversed, the Majority's ruling will place the ADA beyond the manageable bounds defined by the Supreme Court in *Alexander v. Choate*, 469 U.S. 287, 301, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985), by holding states liable under the ADA even where the disabled have been provided meaningful access to a state's programs and the purported impediment to access is symbolic at best.[4]

B. OVERVIEW OF THE STATE OF CALIFORNIA'S DISABILITY PARKING PROGRAM

California legislation providing preferential parking for the disabled dates back to 1959, more than thirty years before the enactment of the ADA. Cal. Stats. of 1959, Ch. 716 (App. 79.)[5]

Presently, California's statutes authorize special parking spaces to be set aside and marked for the exclusive use of the disabled. *See, e.g.*, Cal. Veh. Code §§ 22511.7, 22155.8. (App. 117-118.)

Beyond comporting with the ADA, the State of California has implemented a policing mechanism whereby

---

[4] The Ninth Circuit has previously recognized that the standards articulated in *Alexander v. Choate* are applicable to the ADA. *Hunsaker v. Contra Costa County*, 149 F.3d 1041, 1043 (9th Cir. 1998); *Crowder v. Kitigawa*, 81 F.3d 1480, 1484 (9th Cir. 1996).

[5] Indeed, California has been a leader in safeguarding and enhancing disability rights on a number of fronts. *See, e.g.*, Cal. Civil Code §§ 54 et seq.; and, Cal. Govt. Code §§ 11135 et seq., 12940, 12955. (App. 80, 96, 99, 106.)

the use of disability parking spaces, on both public and private property, is restricted to those who display either a disability license plate or a disability parking placard. Cal. Veh. Code § 22507.8. (App. 113.) This policing mechanism is *not* required by the ADA, but clearly provides enhanced benefits to the disabled because it helps ensure that the spaces and other benefits will remain available for disabled individuals. *Dare v. State of California, supra,* 191 F.3d 1167, 1177-1178 (Judge Fernandez, dissenting) (App. 23-24.)[6]

A disabled person, who meets the broad definition of "disabled person" or "disabled veteran" under California law, may obtain a disability license plate for the same price ($28.00) charged to a non-disabled individual for standard license plates. Cal. Veh. Code § 295.5, § 295.7 § 5007(a); § 9250.1(a)(b). (App. 111, 113.) Special disability parking placards which are removable and portable and may be used in lieu of a disability parking plate are also available. Cal. Veh. Code § 22511.55; Cal. Veh. Code § 4461. (App. 110, 120.) The application fee for original and two-year renewal of disability parking placards is $6.00, a mere twenty-five cents per month. Cal. Veh. Code § 22511.55(a)(2)(A) & (a)(3) (App. 120.)

Though not required by the ADA, California's program permits disabled persons to park at all metered spaces absolutely free of charge, without being required

---

[6] California law subjects those illegally parked in disabled spaces to substantial penalties and provides local entities with authority to establish special disability parking enforcement units. *See* Cal. Veh. Code §§ 4461, 4463(d), 22507.9, 22511.8, 22511.56, 22511.57, 42001.5.

to pay parking meter fees, and to park overtime in limited time parking zones. *See* Cal. Veh. Code § 22511.5. (App. 116.)

The State of California's substantial efforts to ensure that the disabled community is provided meaningful access to parking has been made by the State, notwithstanding the considerable fiscal net loss of $1,182,829.00 to the State for the 1995/1996 period alone, even taking into account the placard revenue. *Dare v. State of California, supra,* 191 F.3d at 1177 (Judge Fernandez, dissenting). (App. 21.)

C. THE NINTH CIRCUIT ERRONEOUSLY CONCLUDED THAT THE PURPORTED PROHIBITION AGAINST NOMINAL SURCHARGES WAS NOT IN EXCESS OF CONGRESS' POWERS PURSUANT TO SECTION 5 OF THE FOURTEENTH AMENDMENT

i.) The Ninth Circuit's Opinion Creates A Circuit Split On A Substantial Constitutional Question

Pursuant to the Eleventh Amendment, states are immune from suits arising under federal law and Congress only has limited power to abrogate a state's Eleventh Amendment immunity pursuant to a valid exercise of power. *Seminole Tribe v. Florida,* 517 U.S. 44, 55, 134 L.Ed.2d 252, 116 S.Ct. 1114 (1996); *See Alden v. Maine,* 527 U.S. 706, 119 S.Ct. 2240, 2246-2247, 144 L.Ed.2d 636 (1999).

In the present case, the Ninth Circuit Panel Majority held that Title II of the ADA's "statutory scheme as a whole constitutes a proper exercise of Congress' power to legislate under [Section] 5," and that, therefore, the

ADA's regulations can only be challenged on the grounds that they are "arbitrary, capricious or clearly contrary to the statute." *Dare v. State of California, supra,* 191 F.3d at 1176. (App. 17.) The Panel Majority thus refused to consider the narrower *constitutional* question presented by the State, namely whether the ADA's regulatory ban prohibiting surcharges [28 C.F.R. § 35.130(f)], a ban imposed by Congress through the United States Attorney General, exceeded Congress' Section 5 powers. The Panel Majority rejected review of this significant constitutional question on the ground that it would not engage in "piecemeal" analysis of the ADA. *Dare, supra,* 191 F.3d at 1175-1176. (App. 17.)

The Ninth Circuit's holding is in direct conflict with *Brown v. North Carolina Division of Motor Vehicles, supra,* 166 F.3d 698, 701, also a disability parking placard case, in which the Fourth Circuit held that 28 C.F.R. § 35.130(f), the regulation prohibiting surcharges, *was* in excess of Congress' Section 5 powers. As the *Brown* Court recognized, ratifying an entire title of the ADA and finding blanket abrogation without examining the actual, specific regulatory basis for suit, as the Ninth Circuit Panel Majority espouses, could subject a state to suit in federal court pursuant to an unconstitutional regulation embedded in an otherwise constitutional statutory scheme. Such sweeping validations of abrogation would "be completely discordant with the doctrine of dual sovereignty." *Id.* at 704.

Moreover, as explained by the Supreme Court, two of the "cardinal rules governing the federal courts [are] '[one], never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never

to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' *United States v. Raines*, 362 U.S. 17, 21 (1960) *quoting Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885)." *Brockett v. Spokane Arcades Inc.*, 472 U.S. 491, 501, 86 L.Ed.2d 394, 105 S.Ct. 2794 (1985); *See also Brown v. North Carolina Division of Motor Vehicles, supra*, 166 F.3d at 703-704.

In this case, the Ninth Circuit disregarded this cardinal rule by refusing to consider the particular narrowly tailored constitutional question presented by the State of California, and, thus, created a circuit split on this sensitive and critical issue of state sovereignty.[7]

ii) The ADA's Sweeping Prohibition Against Fees Is Not Appropriate Legislation Under Section 5 Of The Fourteenth Amendment

This Court's recent opinion in *Kimel v. Florida Board of Regents, supra*, 2000 U.S. Lexis 498 ["*Kimel*"] compels a reversal of the Ninth Circuit's decision below. As this

---

[7] Notably, the Ninth Circuit misconstrued the State of California's argument below when it stated that California "acknowledges the constitutionality of Title II of the ADA." *Dare, supra*, 191 F.3d at 1175. (App. 17.) The State of California made no such concession. Rather, in its appeal, California simply elected to raise the more narrowly drawn question regarding the ADA's purported ban on surcharges, thus distinguishing Ninth Circuit precedent holding that the ADA was not in excess of Congress' Section 5 powers. *See Clark v. California*, 123 F.3d 1267, 1270-71 (9th Cir. 1997). This election was neither then nor now intended as a concession regarding the constitutionality of Title II.

Court reaffirmed in *Kimel,* to validly abrogate the Eleventh Amendment immunity, Congress must have enacted its legislation pursuant to Section 5 of the Fourteenth Amendment. *Kimel,* 2000 U.S. Lexis at * 33.[8]

While Section 5 of the Fourteenth Amendment is a positive grant of legislative power to Congress, this grant of power is not unlimited. *Id.* at * 34-35; *City of Boerne v. P.F. Flores ("City of Boerne")* 521 U.S. 507; 117 S.Ct. 2157, 2163, 138 L.Ed.2d 624 (1996). This power extends only to "enforcing" the provisions of the Fourteenth Amendment, not "to determine what constitutes a constitutional violation." *Kimel, supra,* 2000 U.S. Lexis at * 35 *quoting City of Boerne, supra,* 521 U.S. at 519. Consequently, while Congress' enforcement powers allow it to prohibit some constitutionally accepted conduct, " 'there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.' " *Id.* at * 35-36, *quoting City of Boerne, supra,* 521 U.S. at 520.

Applying these principles to the Age Discrimination in Employment Act of 1967 ("ADEA"), the Supreme Court in *Kimel* found a lack of congruence and proportionality between the injury to be prevented or remedied, namely purported Fourteenth Amendment violations,

---

[8] The ADA's stated purpose is to "invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, . . . " 42 U.S.C. § 12101(b)(4). (App. 61.) Congress, however, lacks power under its Article I commerce power to abrogate the States' sovereign immunity. *Kimel v. Florida Board of Regents, supra,* 2000 U.S. Lexis at * 30.

and the means adopted to that end set forth in the ADEA. Specifically, as this Court concluded, the ADEA prohibits very little conduct likely to be held unconstitutional given the indiscriminate scope of the ADEA's requirements, coupled with the fact that age is not a suspect classification and thus is afforded only rational basis review under the Equal Protection Clause. *Kimel, supra,* 2000 U.S. Lexis at * 38-48.

Moreover, this Court's review of the ADEA's legislative record revealed that "Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation." *Id.* at * 49. These factors, viewed together, necessarily rendered the ADEA substantive in operation and effect, rather than remedial. The Supreme Court thus held that Congress exceeded its Section 5 powers in enacting the ADEA. *Id.* at * 52-53.

The same conclusion is mandated in the present case. For purposes of the equal protection clause, this Court has held that disability, like the age classification examined in *Kimel,* is not a suspect or quasi-suspect classification, and is thus subject to the rational basis test. *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) [holding that the rational basis test applies to mental disability].[9]

---

[9] *See also Coolbaugh v. Louisiana* 136 F.3d 430, 433, n.1 (5th Cir. 1998), *cert. denied,* 525 U.S. 819, 142 L.Ed.2d 45, 119 S.Ct. 58 (1998) [extending *City of Cleburne's* application of the rational basis test to the physically disabled]; *Gamble v. City of Escondido,* 104 F.3d 300, 307 (9th Cir. 1997) [same]; and *Lussier v. Dugger,* 904 F.2d 661, 671 (11th Cir. 1990) [same].

The rational basis standard has historically been markedly deferential to state action. As the Court in *Kimel* explained, when "conducting rational basis review, 'we will not overturn such [government action] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can conclude that the [government's] actions were irrational.'[citations.]" *Kimel, supra, 2000 U.S. Lexis at* * 40.[10]

Under this standard, disparate impact, standing alone, is an insufficient basis from which to infer an equal protection violation. *Washington v. Davis*, 426 U.S. 229, 239-248, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976); *See Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 484-485; 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982).

In light of these principles, the ADA's purported regulatory ban on surcharges is clearly not a congruent nor proportional response to any state action that would likely be considered unconstitutional. Equal protection does not mandate that states remedy, free of charge, disparate impact that may be caused by architectural barriers, including inconvenient or distant parking. Architectural barriers "were clearly not erected with the aim or intent of excluding the handicapped." *Alexander v. Choate, supra*, 469 U.S. 287, 296; *See Crowder v. Kitigawa,*

---

[10] As this Court has explained, " 'the problems of government are practical ones and may justify, if they do not require, rough accommodations – illogical, it may be, and unscientific.' [citations]." *Heller v. Doe by Doe*, 509 U.S. 312, 321, 125 L.Ed.2d 257, 113 S.Ct. 2637 (1993).

supra, 81 F.3d at 1483 ["few would argue that architectural barriers to disabled persons such as stairs, or communication barriers such as the preference for the spoken word, are intentionally discriminatory."]

Moreover, unless motivated by discriminatory animus or irrational prejudice or fear, a state's legislative choices on how best to assist the disabled will more often than not satisfy equal protection. As the Supreme Court has explained, "[w]hen social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude." *City of Cleburne, supra*, 473 U.S. at 440.

Indeed, the provision of most types of accommodation to address the needs of the disabled, though perhaps sound public policy, would likewise not be *constitutionally* required as a general matter. The reality is that a disabled person needing such accommodation imposes costs, whether financial or administrative, which are not attendant to the non-disabled. *See Borkowski v. Valley Cent. School Dist.*, 63 F.3d 131, 138, n.3 (2nd Cir. 1995).

A government has a legitimate interest in performing its functions in a cost-efficient manner. Consequently, from a constitutional point of view, a decision not to accommodate or to accommodate in a different manner than technically required by the ADA, would, in most instances, be rationally related to the interests of cost-efficiency. See *Welsh v. City of Tulsa, Okl.*, 977 F.2d 1415, 1420 (10th Cir. 1992) [for purposes of equal protection, "an employer does not act irrationally by choosing an applicant who does not need any special accommodations over one who does. [fn. omitted.]"]

Consequently, there is also no significant likelihood that nominal administrative fees assessed to defray the costs of programs designed to assist the disabled would violate the Equal Protection Clause. Fees assessed by local governments which do not involve suspect classifications or fundamental rights have typically been found rationally related to a legitimate governmental purpose.[11]

Finally, as with the ADEA Congressional record reviewed in *Kimel, supra*, 120 S.Ct. 631, an examination of the ADA's Congressional record only underscores the lack of congruency and proportionality between the ADA and the Equal Protection Clause. While the ADA's congressional record may contain anecdotal evidence of physical access problems encountered by the disabled in public facilities, such societal problems, serious as they concededly are, simply do not implicate unconstitutional conduct on behalf of the states. *See Kilcullen v. New York State Department*, 33 F.Supp. 133, 146-151 (N.D.N.Y. 1999) [providing an examination of the ADA's congressional record.]; *Brown v. North Carolina Division of Motor Vehicles, supra*, 166 F.3d 698, 707; *Contra*, e.g., *Muller v. Costello*, 187 F.3d 298, 308-311 (2nd Cir. 1999).

In reality, the sweeping ban against surcharges attempts what was fatal to the ADEA in *Kimel, supra*, 120

---

[11] *See, e.g., Baldwin v. Montana Fish & Game Comm.*, 436 U.S. 371, 388-391, 56 L.Ed.2d 354, 98 S.Ct. 1852 (1978); *Howell v. The State Board of Equalization*, 731 F.2d 624, 628-629 (9th Cir. 1984), *cert. denied*, 469 U.S. 933, 83 L.Ed.2d 266, 105 S.Ct. 330; *Hawaii Boating Ass'n v. Water Transp. Facilities*, 651 F.2d 661, 666 (9th Cir. 1981).

S.Ct. 631, namely, congressional alteration of the judicially selected level of scrutiny for Equal Protection analysis. Congress, however, may not validly abrogate state sovereign immunity by creating a new substantive right outside the scope of the Fourteenth Amendment.

D. THE NINTH CIRCUIT'S DECISION THAT THE PLACARD APPLICATION FEE CONSTITUTES FACIAL DISCRIMINATION IS ERRONEOUS AS A MATTER OF LAW.

The Ninth Circuit Panel Majority held that the disability parking placard fee constituted "facial discrimination." *Dare v. State of California, supra,* 191 F.3d 1167 at 1171. (App. 6.) By reaching this conclusion, the Ninth Circuit held that it need not analyze this case pursuant to the well-established "meaningful access" test formulated by the Supreme Court in *Alexander v. Choate, supra,* 469 U.S. 287, 296, 299-302, in which minimal or inconsequential burdens on access do *not* constitute discrimination under the ADA. *Hunsaker v. Contra Costa County, supra,* 149 F.3d at 1042-43.

The Ninth Circuit's determination that this is a case of facial discrimination is fundamentally flawed. The State of California provides a benefit to the disabled – a benefit which it does not provide the non-disabled – by selling to the disabled a placard allowing them to park in preferential parking spaces, as well as to park free for unlimited time at metered spaces. The Ninth Circuit in essence has held that because the State does not provide a greater benefit than it in fact does, i.e., because it does not

give the placards to the disabled free of charge, the State is discriminating against the disabled.

The Ninth Circuit is in error. The preference involved, preferential parking rights, is not provided at all to the non-disabled. Thus, the State cannot be accused of treating the non-disabled more favorably than the disabled. Indeed, the opposite is true.

To establish a case of facial discrimination, one must demonstrate that a class of similarly situated individuals is being given preferential treatment. *City of Cleburne v. Cleburne Living Center, supra,* 473 U.S. 432, 439; *Plyer v. Doe,* 457 U.S. 202, 216, 102 S.Ct. 2382, 2394, 72 L.Ed.2d 786 (1982). Even if California's provision of a benefit (asserted to be inadequate) could be construed as discriminatory, the "discrimination" would be that of disparate impact, rather than intentional discriminatory treatment. Indeed, this case concerns California's attempt to remedy a possible architectural barrier, namely inconvenient or distant parking that the disabled may face. As explained *supra,* while architectural barriers may result in a possible disparate impact on the disabled, they generally do not constitute intentional or "facial" discrimination. *See Alexander v. Choate, supra,* 469 U.S. 287, 296.

Moreover, this Court has unequivocally held that possible disparate impact cases must be analyzed pursuant to the denial of meaningful access standards. *Id.* Indeed, the Supreme Court has rejected the "boundless notion that all disparate-impact showings constitute prima facie violations of [Section 504 of the Rehabilitation Act]." *Alexander v. Choate, supra,* 469 U.S. 287, 299. The

Ninth Circuit has correctly recognized that this fundamental principle is equally applicable to challenges brought under the ADA. *Hunsaker v. Contra Costa County, supra,* 149 F.3d 1041, 1042-43. Consequently, even if a person is disproportionately burdened, where there is "meaningful access" to state services, programs, and activities, no discrimination is found. *Alexander v. Choate, supra,* 469 U.S. at 300.

Since nominal placard fees have no "particularly exclusionary effect," nor will said fees keep the disabled from benefitting meaningfully from the program, the Ninth Circuit seriously erred in concluding that respondents had satisfied their prima facie case and could successfully circumvent the meaningful access test. *Alexander v. Choate, supra,* 469 U.S. 287, 299.

E. THE NINTH CIRCUIT MISAPPREHENDS AN ISSUE OF NATIONAL IMPORTANCE IN DETERMINING THAT PLACARD FEES ARE A "SURCHARGE" UNDER THE ADA: THIS HOLDING IS CONTRARY TO FEDERAL LAW EXPRESSING ASSENT TO SUCH FEES.

To conclude that the prohibited surcharges under 28 C.F.R. § 35.130(f) include placard fees, the Panel Majority ignored valid indicia of Congressional intent to the contrary and substituted its own inference. Under Title II and its regulations, California is required only to provide an adequate number of parking spaces of certain specifications in existing parking lots or garages over which it has jurisdiction. *See* 42 U.S.C. §§ 35.150(b), 35.151(c), Appendix A to part 28 C.F.R. Part 36, 4.1.2., 4.6. (App. 71, 74, 76-78.) Neither the ADA nor its regulations promulgated

thereunder impose any duty on a state entity to issue disability identification license plates or placards or implement any law enforcement program to regulate disability parking. Indeed, in the ADA, Congress refrained from restricting a state's exercise of its traditional police powers in *regulating* or policing disability parking. The absence of legislative directive reflects the intent of Congress to delegate broad authority to the states in regulating parking.

28 C.F.R. § 35.130(f) only prohibits surcharges "to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are *required* to provide [disabled individuals] with the non-discriminatory treatment required by the Act or this part." (Emphasis added.) Given that neither disability parking placards nor any other identification system is a required measure under the ADA, the surcharge regulation is simply not applicable.

California maintains that California's policing system, even with a nominal fee, is a far superior program for the disabled than a program that relies on the "honor" system. That the placard program is not governed by the terms of the ADA is further evidenced by the fact that Congress *specifically* addressed disability parking placards in a different federal law, Public Law 100-641 § 3 and its regulation, the Uniform System for Parking for Persons with Disabilities, 23 C.F.R. Part 1235 ("Uniform System") which encourages a program much like California's and implicitly authorizes a nominal application fee

for removable placards, while explicitly prohibiting enhanced fees for disability license plates. (App. 57, 64.)[12]

Notwithstanding the Uniform System, the Panel Majority inexplicably found that California's program violated the regulation prohibiting surcharges on ADA measures. The Majority admits that the Uniform System contemplates placard fees, but improperly disregards this proof of Congressional intent, labeling it "hortatory." *Dare, id.* at 1172. (App. 8-9.)

The fact that the Uniform System may be hortatory does not render it irrelevant. To the contrary, the deference afforded by Congress to the states in Public Law 100-641 § 3 undeniably evidences Congressional intent that states should retain their historical police powers with respect to disability parking enforcement, including the assessment of fees.

Moreover, courts must review the entire federal scheme relative to a particular subject matter to glean Congressional intent, especially when the subject matter is dealt with under a number of separate enactments. *See, e.g., Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984); *Morton v. Mancari*, 417 U.S.

---

[12] Significantly, the Uniform System's Final Report of the Handicapped Parking Regulatory Negotiation Advisory Committee, the committee which formulated the Uniform System, noted that the committee had given the states "wide latitude in establishing a system that meets the guidelines" and that the committee believed that the states should be permitted to exercise administrative discretion for, *inter alia*, "fees for removable windshield placards." (Federal Register Vol. 56 No. 47, Appendix C to the Preamble Committee report, at p. 10344 [Conclusion].)

535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974). The Panel Majority cannot simply ignore federal law because it is not mandatory.

Given that assessing a nominal placard fee is not incompatible with the goals or letter of the ADA, there is no conflict between the Uniform System and the ADA. Title II was enacted after the Uniform System. However, the non-discrimination principles contained in Title II of the ADA, 42 U.S.C. § 12132 *et seq.*, are virtually identical to those from § 504 of the Rehabilitation Act, 29 U.S.C. § 794, which was in force at the time the Uniform System was enacted.[13] Had Congress believed that nominal placard fees were discriminatory in violation of the Rehabilitation Act, it would not have implicitly sanctioned these fees in the Uniform System.

The Ninth Circuit was in clear error in concluding that the ADA, rather than the Uniform System, governed respondents' challenge to the State of California's *de minimis* placard fee. By doing so, the Ninth Circuit's decision contradicts clear Congressional intent on a matter involving a state's historic police powers.

---

[13] The anti-discrimination directive set forth in the ADA is modeled after the anti-discrimination statute set forth in the Rehabilitation Act. "It is the Committee's intent that section 202 and other sections of the legislation be interpreted consistent with *Alexander v. Choate*, 469 U.S. 287 (1985)" (Senate Comm. On Labor and Human Resources, S. Rep. No. 116, 101st Cong., 1st Sess., at 44, 45 (1989).)

CONCLUSION

This petition raises critical constitutional and statutory questions. A decision by the Supreme Court regarding these issues will not only resolve the substantial litigation relating to disability parking placard fees presently being conducted nationwide, but will provide much needed clarity regarding the proper scope of federal disability legislation as applied to the states. Petitioner, the State of California, Department of Motor Vehicles, therefore respectfully requests that a Writ of Certiorari issue in the within case.

Dated: February 24, 2000

Respectfully submitted,

BILL LOCKYER
Attorney General
DAVID CHANEY
Senior Assistant Attorney General
SILVIA M. DIAZ
Supervising Deputy Attorney General
ANGELA SIERRA
Deputy Attorney General
Attorneys for Petitioner

William Robert DARE;
Gary Petillo, Plaintiffs-Appellees,

v.

State of CALIFORNIA; Dept. of Motor Vehicles,
Defendants-Appellants.

No. 97-56065.

United States Court of Appeals,
Ninth Circuit.
Argued and Submitted April 15, 1999.

Decided Sept. 16, 1999.

Angela Sierra, Deputy Attorney General, San Diego, California, for the defendants-appellants.

Andrew R. Hall, Elizabeth Staggs-Wilson, Davis, Wright & Tremaine, Los Angeles, California, for the plaintiffs-appellees.

Mary H. Williams, Assistant Attorney General, Salem, Oregon, for the amicus curiae.

Appeal from the United States District Court for the Central District of California; J. Spencer Letts, District Judge, Presiding. D.C. No. CV-96-05569-JSL-ANx.

Before: D.W. NELSON, FERNANDEZ, and W. FLETCHER, Circuit Judges.

Opinion by Judge D.W. NELSON; Dissent by Judge FERNANDEZ.

D.W. NELSON, Circuit Judge:

This case involves a challenge under the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101, et seq.

(West Supp.1999) ("ADA"), and its regulations to California's $6 biennial fee for disability parking placards. The State of California, Department of Motor Vehicles [hereinafter "California"], appeals the district court's grant of partial summary judgment in favor of William Robert Dare, Gray [sic] Petillo, and the class of plaintiffs they represent. California claims that the fee does not violate the ADA and that a blanket prohibition on such nominal fees is unconstitutional. We disagree and affirm the district court.

Facts and Procedural History

California has a comprehensive priority parking program for qualifying disabled individuals and veterans. *See* Cal. Veh.Code. §§ 295.5, 295.7 (West 1999). California provides these individuals with extensive priority parking and exemptions from all parking meter fees and most parking time restrictions. *See id.* §§ 22511.5, 22511.7, 22511.8. To prevent abuse, California limits access to these privileges to vehicles displaying state-issued disability license plates or parking placards. *See id.* §§ 22507.8, 22511.5. California imposes significant fines upon illegal use of disability parking spaces and authorizes local entities to establish enforcement units. *See id.* §§ 4461, 4463(d), 22507.9, 22511.8, 22511.56, 22511.58, 42001.5.

Registered vehicle owners who are disabled themselves or who use their vehicles to transport disabled individuals at least 51% of the time can obtain disability license plates. California charges the standard license plate fees for these special plates. *See id.* §§ 5007(a), 9250.

In lieu of or in addition to a disability license plate, California issues disability parking placards to disabled individuals for a $6 fee. *See id.* § 22511.55. Individuals may use these portable placards in multiple vehicles. The placards expire if not renewed every two years, and California charges fees for renewal or replacement. *See id.* § 22511.55(a)(3) & (c)(2). The placard fees partly defray the cost of the disability parking program.

On August 13, 1996, Dare and Petillo, two disabled individuals, filed a class action lawsuit challenging California's $6 placard fee as a violation of ADA Title II and its promulgating regulations. Dare and Petillo allege that the fee constitutes an impermissible surcharge upon measures necessary to provide the nondiscriminatory treatment of individuals and groups required by the ADA. They rely on 42 U.S.C. § 12132, which states that "[s]ubject to the provisions of this subchapter, no qualified individual shall, by reason of such disability, be excluded from participation in or denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. To prove the ADA's particular prohibition of surcharges on parking permits, Dare and Petillo cite 28 C.F.R. § 35.130(f), promulgated by the Department of Justice in implementing the ADA, which states that

> [a] public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual with the nondiscriminatory treatment required by the Act or this part.

28 C.F.R. § 35.130(f) (1998).

The district court granted partial summary judgment with respect to the class of people qualifying as disabled under the ADA,[1] found the fee to be an impermissible surcharge, and ordered a permanent injunction against California's imposition of the fee. California timely appeals.

Jurisdiction

We have jurisdiction pursuant to 28 U.S.C. § 1292(a)(I) (West Supp.1999) to review the district court's interlocutory order granting a permanent injunction. Because the district court's partial summary judgment order provides legal authority for the injunction and is thus inextricably bound with it, we also have jurisdiction to review that order. *See Paige v. State of California,* 102 F.3d 1035, 1040 (9th Cir.1996).

Standard of Review

We review for abuse of discretion the district court's grant of a motion for a permanent injunction, *see Gaudiya Vaishnava Soc. v. City of San Francisco,* 952 F.2d 1059, 1062 (9th Cir.1991), but review any determination underlying the grant of the motion by the standard that applies to that determination, *see Multnomah Legal Servs. Workers Union v. Multnomah County Legal Aid Serv.,* 936 F.2d 1547, 1552 (9th Cir.1991). We review de novo a district court's

---

[1] Specifically, this plaintiff class included all purchasers of California placards since January 26, 1992 and future purchasers who are disabled under the ADA.

grant of a motion for partial summary judgment. *See Thompson v. Holy Family Hosp.*, 121 F.3d 537, 539 (9th Cir.1997).

Discussion

This case raises two main issues: (1) Does California's $6 placard fee violate Title II of the ADA and its implementing regulations, and, if so, (2) was Congress's enactment of Title II of the ADA a valid exercise of its power under § 5 of the Fourteenth Amendment to abrogate California's Eleventh Amendment immunity from suit? Because we answer both of these questions in the affirmative, we affirm the district court's grant of partial summary judgment and a permanent injunction against imposition of the placard fee.

I. Violation of ADA Title II

Analyzing whether California's $6 placard fee violates the ADA requires three inquiries. First, what obligations does Title II impose upon states regarding fees for measures under the ADA? Second, does Public Law 100-641, 23 U.S.C. § 402 (West Supp.1999), which contemplates a fee for disabled parking placards as part of a uniform system for disabled parking, limit states' Title II obligations? Third, are these obligations violated by California's $6 fee for parking placards? As explained below, we conclude that the $6 fee constitutes a surcharge for required measures in violation of the ADA and its implementing regulations.

A. Obligation under Title II

In order to evaluate whether a fee constitutes a surcharge that violates Title II of the ADA, we conduct a two-part inquiry. First, as a threshold matter, we consider whether the measure for which California levies the fee is "required to provide that individual or group nondiscriminatory treatment" as mandated by the ADA. 28 C.F.R. § 35.130(f). If California charges for a measure not required under the ADA, the inquiry ends; 28 C.F.R. § 35.130(f) only forbids surcharges for "required" measures.

Second, we evaluate whether the fee for the measure is a surcharge; in other words, we consider whether it constitutes a charge that nondisabled people would not incur. If nondisabled people pay the same fee for an equivalent service, the charge to disabled people would not constitute a surcharge on a "required" measure. Thus, for example, a state can charge a fee for disabled license plates so long as it charges the same fee for nondisabled license plates.

Because surcharges against disabled people constitute facial discrimination, the meaningful access test formulated by the Supreme Court in *Alexander v. Choate*, 469 U.S. 287, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985), does not apply. Under this test, a court considers whether the allegedly discriminatory measure prevents "meaningful access to the benefit that the grantee offers." *Id.* at 301, 105 S.Ct. 712. The Ninth Circuit has applied this test in the ADA context to evaluating whether facially neutral laws violate § 12132. *See Hunsaker v. Contra Costa County,*

149 F.3d 1041, 1042-43 (9th Cir.1998); *Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir.1996).

Using this standard in the context of facially discriminatory laws, however, would ignore the clear language of Title II. *Cf. Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 733-35 (9th Cir.1999) (holding that the reasonable modifications test does not apply to facially discriminatory laws because they present per se § 12132 violations). § 12132 covers not only "exclusion from participation in or [denial of] benefits of the services, programs, or activities of a public entity," but also being "subjected to discrimination by any such entity." 42 U.S.C. § 12132. By reviewing all § 12132 claims under a meaningful access test, this Circuit would focus only on exclusions and denials, and ignore completely the discrimination clause, not to mention the explicit language of the ADA regulation at issue here. Other courts evaluating fees similar to the one at issue here have read the statute and ADA regulation together rather than applying a meaningful access test. *See Thompson v. Colorado*, 29 F.Supp.2d 1226, 1231 (D.Colo.1998); *Thrope v. State of Ohio*, 19 F.Supp.2d 816, 824 (S.D.Ohio 1998); *McGarry v. Director, Dept. of Revenue*, 7 F. Supp.2d 1022, 1028 (W.D.Mo.1998). We thus follow their approach and do the same; we hold that when states apply charges to required measures, we consider whether these fees constitute a surcharge forbidden under the ADA.

B. Effect of Public Law 100-641

The government urges us to view Public Law 100-641 and the regulations promulgated pursuant to it as justifying the placards surcharge. On November 9, 1988, prior to the passage of the ADA, Congress enacted Public Law 100-641, 23 U.S.C. § 402. This law indicates that the Secretary of Transportation shall issue regulations which: (1) establish a uniform system for handicapped parking designed to enhance the safety of handicapped individuals and (2) encourage adoption of such a system by all the states. *See id.*

Pursuant to Public Law 100-641, the Department of Transportation (DOT) promulgated regulations in March 1991, eight months after Congress enacted the ADA. The DOT regulations provide in pertinent part that:

> Special license plates, removable windshield placards, or temporary removable windshield placards displaying the International Symbol of Access shall be the only recognized means of identifying vehicles permitted to utilize parking spaces reserved for persons with disabilities which limit or impair the ability to walk.

23 C.F.R. § 1235.6 (1998). DOT regulations further provide that each state shall issue special license plates upon the application of a person with a disability that impairs the ability to walk and that "[t]he fee for the issuance of a special license plate shall not exceed the fee charged for a similar license plate for the same class vehicle." *Id.* § 1235.3. In contrast to the provisions concerning license plate fees, neither Public Law 100-641 nor the regulations prohibit the imposition of placard fees.

The government's argument fails, however, because Public Law 100-641 is purely hortatory. *See McGarry*, 7 F.Supp.2d at 1026. Congress enacted Public Law 100-641 two years before the ADA and the law has no enforcement mechanism. Even California concedes that in recognizing principles of federalism and state sovereignty, Congress rendered state compliance with Public Law 100-641 completely voluntary.

In contrast, the ADA expressly applies to the states through Congress's Fourteenth Amendment powers, as discussed in more detail in Part II. Regulations promulgated pursuant to the ADA bind states so long as the regulations are not arbitrary, capricious, or contrary to the ADA. *See Does 1-5 v. Chandler*, 83 F.3d 1150, 1153 (9th Cir.1996). As discussed below, 28 C.F.R. § 35.130(f) meets that standard. We thus evaluate California's surcharge based on the requirements of Title II and 28 C.F.R. § 35.130(f). Public Law 100-641 does not impact our analysis.

C. Application to the California Fees

Applying this approach to the California fee at issue, we find the fee to be a surcharge for a required measure in violation of the ADA. The ADA requires special parking arrangements such as handicapped parking spaces. These spaces allow disabled people equal access to public buildings in which California provides services, programs, and activities. Because California polices handicapped parking spaces, disabled people need placards or license plates to use them. California thus meets the

ADA's requirement for nondiscriminatory access to public buildings by providing disabled people with placards and license plates.

Furthermore, California's provision of license plates alone would not be sufficient to give individuals nondiscriminatory access to public places. In addition to the fact that many disabled people may not own cars or have someone who drives them 51% of the time, even those who do may sometimes have to use other vehicles as passengers or as drivers. They may rent cars or wish to drive with another person. To require disabled people to use only a designated car for which they have a license plate restricts them far more in accessing public places than people who lack their disabilities. This reasoning comports with cases by other courts that have struck down fees like the one in California. *See Thompson*, 29 F.Supp.2d at 1231-32; *Thrope*, 19 F.Supp.2d at 825; *McGarry*, 7 F.Supp.2d at 1028.

Because providing the placards is a required measure under California's current program of providing access to handicapped parking spaces, we turn to the question of whether charging the fee for them constitutes a forbidden surcharge. This issue hinges on whether California provides the same fee for an equivalent service for nondisabled people. In support of such equivalence, the appellees argue that the placard fee is comparable to, and probably less than, charges nondisabled people accrue at parking meters. California thus claims that if the $6 fee is viewed as a partial payment of waived meter fees, then disabled people are not being charged more than other people.

California's argument fails, however, because many public places do not have parking meters and people who lack disabilities face no fees in parking at those places. Such a distinction is unacceptable. Charging disabled people for parking that would otherwise be free constitutes discrimination in the provision of access to public buildings, a measure required under the ADA. We thus affirm the district court on this issue and hold that California's fee for handicapped parking placards violates the ADA.

II. Constitutionality

Having established an ADA violation, we turn to the constitutional issues raised by the government. This Circuit has held that in enacting Title II of the ADA, Congress validly abrogated state sovereign immunity pursuant to its Fourteenth Amendment powers. *See Clark v. California*, 123 F.3d 1267, 1270-71 (9th Cir.1997). The majority of Circuits addressing this issue have followed this Circuit's approach in Clark.[2]

---

[2] *Compare Martin v. Kansas*, 190 F.3d 1120, 1125-29 (10th Cir.1999) (holding that the ADA constitutes a proper exercise of Congress' Fourteenth Amendment powers), *Muller v. Costello*, 187 F.3d 298 (2d Cir.1999) (page references not available) (same), *Amos v. Maryland Dept. of Pub. Safety and Correctional Servs.*, 178 F.3d 212, 216-23 (4th Cir.1999) (same), *Kimel v. State of Fla. Bd. of Regents*, 139 F.3d 1426, 1433 (11th Cir.1998) (same), *Coolbaugh v. Louisiana*, 136 F.3d 430, 432- 38 (5th Cir.1998) (same), *cert. denied*, ___ U.S. ___, 119 S.Ct. 58, 142 L.Ed.2d 45 (1998), and *Crawford v. Indiana Dept. of Corrections*, 115 F.3d 481, 487 (7th Cir.1997), *with Alsbrook v. City of Maumelle*, 184 F.3d 999, 1005-09 (8th Cir.1999) (en banc) (holding that Title II of the ADA was not a valid

We continue to adhere to our holding in Clark today. In light of the Supreme Court's recent decision in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, ___ U.S. ___, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999) [hereinafter Florida Prepaid], and the circuit split on this issue, however, we provide further discussion of Title II of the ADA as an appropriate Congressional exercise of its § 5 powers that thus accords with both the Tenth and Eleventh Amendments.

A. Eleventh Amendment

1. Title II of the ADA

When Congress both expresses unequivocal intent to abrogate immunity and also acts pursuant to its § 5

---

exercise of Congress's § 5 powers), and *Brown v. North Carolina Div. of Motor Vehicles*, 166 F.3d 698, 702-10 (4th Cir.1999) (holding that forbidding surcharges under the ADA exceeds Congress' Fourteenth Amendment powers). *See generally Torres v. Puerto Rico Tourism Co.*, 175 F.3d 1, 4-5 (1st Cir.1999) (failing to reach the issue, in part, because of the dominant precedent upholding Congress's exercise of its Fourteenth Amendment powers in enacting the ADA); *Nelson v. Miller*, 170 F.3d 641, 648 & n. 7 (6th Cir.1999) (declining to reach this issue, but summarizing the state of the law). We note that the Fourth Circuit has ruled both that the ADA constitutes a proper exercise of Congress's § 5 powers, *see Amos*, 178 F.3d at 221-222 & n. 8, and that the regulation forbidding surcharges exceeds Congress's § 5 authority, *see Brown*, 166 F.3d at 702-10. Because we hold that regulations do not receive an independent constitutional assessment, *see* infra Subsection II.A.2, the Fourth Circuit authority is thus more in accord with than opposing our Fourteenth Amendment analysis.

powers, a state's immunity is waived. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996); *Clark*, 123 F.3d at 1269. As noted in Clark, "Congress has unequivocally expressed its intent to abrogate the State's immunity under . . . the ADA," 123 F.3d at 1269. The focus of our discussion is therefore on why Title II constitutes a valid exercise of Congress's powers under § 5 of the Fourteenth Amendment.

The Court's recent decision in *Florida Prepaid* clarifies the congruence and proportionality test outlined in *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). The first step of this test involves identification of the "Fourteenth Amendment 'evil' or 'wrong' that Congress intended to remedy," using historical experience as a reference point. *Florida Prepaid*, 119 S.Ct. at 2207 (quoting *City of Boerne*, 521 U.S. at 525, 117 S.Ct. 2157). The second step requires consideration of whether the provisions of the statute are proportional to their remedial or preventive goal. *See id.* at 2210 (quoting *City of Boerne*, 521 U.S. at 532, 117 S.Ct. 2157).

Before applying this test to Title II of the ADA, we note that Congress's enforcement authority is at its apex when fashioning remedies aimed at the core Fourteenth Amendment guarantee of Equal Protection. *City of Boerne* and *Florida Prepaid* both emphasized Congress's power in dealing with discrimination, such as in the voting rights context. *See Florida Prepaid*, 119 S.Ct. at 2207; *City of Boerne*, 521 U.S. at 525-27, 117 S.Ct. 2157. The Court explained that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and

intrudes into legislative sphere of autonomy previously reserved to the States." *Florida Prepaid*, 119 S.Ct. at 2206 (quotation omitted); *City of Boerne*, 521 U.S. at 518, 117 S.Ct. 2157 (internal quotation omitted).

a. Congruence

Although disabled people do not constitute a suspect class, the Equal Protection Clause prohibits irrational and invidious discrimination against them. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439, 446, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). When it enacted the ADA, Congress made specific factual findings of arbitrary and invidious discrimination against the disabled. *See id.* § 12101(a)(7). On the basis of these findings, Congress concluded that the ADA was a necessary legislative response to a long history of arbitrary and irrational discrimination against people with disabilities. *See* 42 U.S.C. § 12101(b).[3] We thus hold that the ADA in general and Title II in particular satisfy the congruence requirement.

---

[3] A number of cases have held that the ADA constitutes a proper exercise of Congress' Fourteenth Amendment powers with specific reference to Congress's factual findings. *See Muller*, 187 F.3d at 310; *Amos*, 178 F.3d at 218-19; *Kimel*, 139 F.3d at 1433; *Coolbaugh*, 136 F.3d at 435-38; *Crawford*, 115 F.3d at 486-87; *cf. Timothy Cook, The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L.Rev. 393, 393-94 & nn. 1-4 (1991) (discussing Congress's extensive fact-finding and the history of state-sponsored irrational discrimination and animus against disabled people).

b. Proportionality

Having established the ADA's congruence with Congress's power to enforce the Equal Protection Clause, we turn to proportionality. In so doing, we reiterate the importance of deference to Congress in this analysis.[4] The Supreme Court has specifically found protections for people with disabilities to be an area in which Congressional judgment should be given great deference. *See Cleburne Living Center*, 473 U.S. at 442-43, 105 S.Ct. 3249.[5] The ADA is thus an appropriate exercise of § 5 powers if Congress enacted it in response to a widespread problem of unconstitutional discrimination that includes state programs

---

[4] As stated above, the Supreme Court has explicitly indicated that Congress's enforcement power to deter or remedy constitutional violations allows it to prohibit some constitutionally acceptable conduct, even in traditional areas of state autonomy, as part of its larger enforcement effort. *See City of Boerne*, 521 U.S. at 518, 117 S.Ct. 2157 (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976)); accord *Florida Prepaid*, 119 S.Ct. at 2206 (quoting *City of Boerne*, 521 U.S. at 518, 117 S.Ct. 2157).

[5] Discussing in *Cleburne Living Center* the legal protections to which individuals with developmental disabilities are entitled, the Court noted that "[h]ow this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill- informed opinions of the judiciary." *Id.* The Court recently reinforced this approach in *Olmstead v. Zirming*, ___ U.S. ___, 119 S.Ct. 2176, 144 L.Ed.2d 540 (1999). Although declining to reach constitutional questions, *see id.* at 2181, the Court held that "unjustified isolation . . . is properly regarded as discrimination based on disability," *id.* at 2185, and spoke approvingly of the ADA's efforts to end that isolation, *see id.* at 2187.

and services and if the ADA's provisions are proportional to the scope of that discrimination.[6]

As noted above, Congress made extensive factual findings regarding the widespread arbitrary and invidious discrimination which disabled people face. *See* 42 U.S.C. § 12101(a). The ADA's particular provisions for each sector then indicate specifically the discrimination which is forbidden and the conduct needed to remedy the discrimination. *See* 42 U.S.C. § 12101 et seq. Although Title II's provisions may prohibit some State conduct which would pass muster under rational basis review, the Title's focus is on eliminating the discrimination outlined in the factual findings.

We thus agree with the Second Circuit and hold that "[i]n light of Congress's findings of the extent of discrimination against people with disabilities and with due regard to the deference owed to Congress in making such judgments, we will not second-guess Congress's judgment that the ADA was targeted to remedy and prevent irrational discrimination against people with disabilities." *Muller,* 187 F.3d at 309. Congress's findings were sufficiently extensive and related to the ADA's provisions that the provisions can "be understood as responsive to or designed to prevent, unconstitutional behavior." *Florida Prepaid,* 119 S.Ct. at 2210 (quoting *City of Boerne,* 521 U.S. at 532). Therefore, we hold that the ADA was a congruent

---

[6] We therefore disagree with the Eighth Circuit that the ADA's legislative record must "support the proposition that most state programs and services discriminate arbitrarily against the disabled" for abrogation of immunity to be appropriate. *Alsbrook,* 184 F.3d 999, 1009-10.

and proportional exercise of Congress's enforcement powers under § 5 of the Fourteenth Amendment that abrogated Eleventh Amendment immunity.

2. Acceptability of 28 C.F.R. § 35.130(f)

Although California acknowledges the constitutionality of Title II of the ADA, it claims that the prohibition in 28 C.F.R. § 35.130(f) against states charging even de minimis administrative fees violates the Fourteenth Amendment. We disagree.

The primary flaw in the government's approach is that it conducts its Fourteenth Amendment analysis in a piecemeal manner. Because the statutory scheme as a whole constitutes a proper exercise of Congress' power to legislate under § 5, *see Clark*, 123 F.3d at 1270-71, regulations promulgated pursuant to the ADA "must be given 'legislative and hence controlling weight unless they are arbitrary, capricious, or clearly contrary to the statute.' " *Does 1-5*, 83 F.3d at 1153 (quoting *United States v. Morton*, 467 U.S. 822, 834, 104 S.Ct. 2769, 81 L.Ed.2d 680 (1984)).[7]

---

[7] As the Supreme Court stated in *Olmstead*:

> [b]ecause the Department [of Justice] is the agency directed by Congress to issue regulations implementing Title II, its views warrant respect. We need not inquire whether the degree of deference described in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), is in order; "[i]t is enough to observe that the well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgement to which courts and litigants may properly resort for guidance.' "

Here, the regulation is not arbitrary, capricious, or contrary to the ADA. *See id.* Title II protects the rights of disabled people to have the same public services, programs, and activities as those who are not disabled. *See* 42 U.S.C. § 12132. If public entities place a surcharge on measures that help disabled people achieve this parity, disabled people then are paying fees others do not and so are not being treated equally.

Forbidding such additional charges is a solution aimed at preventing this type of discrimination; it addresses the improper approach to funding services for the disabled, *see* 28 C.F.R. § 35.130(f), while leaving states broad flexibility to administer and fund their programs otherwise, *cf. Duprey v. State of Conn., Dept. of Motor Vehicles*, 28 F.Supp.2d 702, 708 (D.Conn.1998) ("If the DMV wants to pass on the costs of providing placards, rather than absorbing the costs itself, it must pass the cost

---

___ U.S. ___, 119 S.Ct. at 2186, 144 L.Ed.2d 540 (quoting *Bragdon v. Abbott*, 524 U.S. 624, 642, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998) (internal quotation and citation omitted)).

In taking this approach, we reject the reasoning of the Fourth Circuit in *Brown*, which determined that "separation of powers, administrability, and federalism" required an examination of "the legality of the specific statute and regulation whose asserted violation by the state government gave rise to the claim for relief in federal court." *Brown*, 166 F.3d at 705. In our view, a piecemeal analysis of the regulations would unduly constrain Congress's power to construct a statutory scheme addressing discrimination; the federal courts, in effect, would have a line-item veto over legislation directed at intentional or arbitrary discrimination by the states.

on to all parkers, and not just those disabled individuals protected by the ADA."). The rationale for this regulation thus dovetails neatly with the purposes of Title II. We therefore hold that 28 C.F.R. § 35.130(f) has controlling weight.

B. Tenth Amendment

Because Title II falls within Congress's Fourteenth Amendment powers, it does not conflict with powers reserved to the states under the Tenth Amendment. *See Ex parte Virginia*, 100 U.S. 339, 344-47, 25 L.Ed. 676 (1879); *see also Armstrong*, 124 F.3d at 1024-25. We thus hold that the ADA does not violate the Tenth Amendment.

Conclusion

The California placard fee violates the ADA and its implementing regulations. Because the ADA constitutes an appropriate exercise of Congress's enforcement powers under § 5 of the Fourteenth Amendment, California's Tenth and Eleventh Amendment challenges fail. Furthermore, we accord 28 C.F.R. § 35.130(f) controlling weight as an regulation promulgated pursuant to the ADA that is not arbitrary, capricious, or contrary to the statute. We therefore AFFIRM the district court's grant of summary judgment in favor of appellees and of a permanent injunction against imposition of the surcharge.

AFFIRMED.

FERNANDEZ, Circuit Judge, dissenting:

Because I cannot agree that the small fee California charges for placards violates the ADA, I dissent.

California has sought to ameliorate the parking problems that those with disabilities can face when they use automobiles to attend to business, recreation or any of the other pursuits of daily life. To that end, special parking places are set aside and marked for the sole use of disabled people. *See, e.g.*, Cal. Veh.Code §§ 22511.7, 22511.8. In addition, unlimited parking is available in zones in which others may only park for a limited time, and disabled people need not pay parking meter fees. *See* Cal. Veh.Code § 22511.5. It is one thing, however, to set aside spaces and confer other benefits, but quite another to assume that only disabled people will take advantage of those opportunities. Others may well succumb to the temptation to park in the special spaces, which are generally more convenient to the place one is going and which may well be open when all other desirable spaces are filled. Therefore, California not only has made the spaces available, but also has created a method that helps to assure that the spaces, and other benefits, will remain available for disabled people only.

Under California law, a disabled person who owns a motor vehicle can obtain a license plate, which contains a special symbol – the International Symbol of Access, "commonly known as the wheelchair symbol." Cal. Veh.Code § 5007. As interpreted by the DMV, the license plate is also available to any person who is not disabled, if the vehicle is used to transport a disabled person at least fifty-one percent of the time. There is no charge for the license plate beyond that which is paid by every other person who registers an automobile with the DMV.

California, however, also decided to add more flexibility to the program. It recognized that many disabled persons may be driven by others, who do not do so fifty-one percent of the time, and that it would be beneficial if the other person's automobile could also be parked in the special parking spaces when a disabled person was transported. Therefore, California provided for the issuance of special placards, which are portable and can be used in any automobile that is being driven or utilized by a disabled person. *See* Cal. Veh.Code § 22511.55; *see also* Cal. Veh.Code § 22511.56 (misuse of placards). While license plates are issued to every automobile, the special placard is a unique item which is issued to disabled persons only. It, therefore, imposes special costs upon DMV. In order to defray a portion of those added costs, California has imposed a small fee upon those who apply for the placard. That fee is, basically, six dollars every two years. *See* Cal. Veh.Code §§ 22511.55(a)(2), 22511.55(a)(3). That does not pay for the full cost of issuing placards, and in a typical two-year cycle, 1995-1996, DMV's costs exceeded the fee revenues by $1,182,829. That fee is the subject of this litigation. This case deals with a sensitive area which lies at the border of federal and state relationships. Ours is a system of dual sovereignty, and some care must be taken when Congress wishes to have the states carry out congressional policies. The states are not mere adjuncts of the federal government. *See, e.g., Printz v. United States*, 521 U.S. 898, 917-19, 117 S.Ct. 2365, 2376-77, 138 L.Ed.2d 914 (1997). That broods over this case as we undertake the task of deciding whether California violated the ADA when it enacted a placard fee, which amounts to twenty-five cents per month. Dare

argues that it did. If so, and if Congress could constitutionally prohibit that, the district court's decision must be upheld. California attacks both parts of that conjunctive sentence. Because I agree that the ADA was not violated, I see no need to consider the more thorny constitutional portion of the sentence. But that is getting slightly ahead of the story, for I should start with the ADA itself.

That statute, as relevant here, provides that "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. On its face, it would not seem that the fee in question here can be said to, somehow, deny disabled people the benefit of any services offered to the public by California, or that it can be said to discriminate against them. But, of course, the bare words of the statute are not the only law in this area.

The United States Department of Justice is responsible for interpreting and implementing that provision of the ADA. *See* 42 U.S.C. § 12134. It has issued various regulations and guidelines. In explaining its understanding of the requirements of the ADA, the DOJ has stated that "a public entity should provide an adequate number of accessible parking spaces in existing parking lots or garages over which it has jurisdiction." 28 C.F.R. Pt. 35 App. A at 457. There is no dispute that California has provided special parking places for disabled persons with vehicles.

The dispute in this case is over whether California has violated a DOJ regulation, which provides that:

> A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the cost of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

28 C.F.R. § 35.130(f); *see also* Americans with Disabilities Act, DOJ Technical Assistance Manual (Title II), Section II – 3.5400. I would hold that California has not violated that provision.

Certainly, California has not, in as many words, excluded disabled persons from any program generally offered to the public. If a failure to make special parking places available could be said to exclude them from the use of some other program, California has not failed to provide for the spaces themselves. No doubt the spaces are available in the sense that they have been set aside. California, however, has sought to assure that those who are not disabled will not use the spaces. No doubt, its method of doing so can inhibit use by a disabled person because the only rational way to provide the extra assurance is to police usage by placing some sort of special symbol on the parked automobile. Even that is not a perfect solution, of course, because people could use counterfeit permits or otherwise abuse the program. *See* Cal. Veh.Code §§ 4463, 22511.56. Nevertheless, that it does help cannot be doubted.

Under the ADA, as it relates to the issues before us, the most that California is required to do is make accessible parking places available at public facilities. *See* 28 C.F.R. § 36.304(a)(18). That, of course, does not, itself, even require special designation or signing. In fact, one could conceive of a situation where all spaces in a parking area were quite accessible. At any rate, there is no claim that California has not made spaces available. In fact, it has gone far beyond that and has provided for overtime parking in zones limited for everyone else and for free metered parking. *See* Cal. Veh.Code § 22511.5.

Nothing in the law requires that California police usage of the spaces in order to assure that only disabled people are taking advantage of them. Indeed, if the federal government decided that usage must be policed by the states, that would come at least parlously close to an attempt to "commandeer state government" into enforcing a federal government policy at state cost. *See Printz*, 521 U.S. at 927, 117 S.Ct. at 2381. No doubt the provision of spaces has many costs, not the least of which is the expense of setting aside and signing special spaces, perhaps larger than normal, which may go unutilized a good part of the time, and which surely have less usage than other parking spaces. I, of course, need not address those costs. California has willingly accepted them.

California has also accepted the cost, if any, of issuing special license plates for disabled persons who have their own vehicles, which need to be parked, as well as for those who transport disabled people most of the time. *See, e.g.*, Cal. Veh.Code § 5007. I need not decide whether California could impose a charge for that enhancement of the parking program because, again, California has not

sought to do so. In that regard, however, it is interesting to note that Congress passed a statute designed to "encourage" states to adopt a uniform system for handicapped parking. *See* Act of Nov. 9, 1988, Pub.L. No. 100-641, 102 Stat. 3335 § 3 (1988) (Handicapped Parking System Provision (HPS)). It did so before the enactment of the ADA, but at a time when the Rehabilitation Act of 1973 was in effect. *See* 29 U.S.C. § 701-7961. At that point, Congress indicated that a uniform policy should provide for special license plates for which there should be no charge. *See* HPS § 3(b)(1)(B) & (D). It also indicated that the uniform policy should provide for placards. *See* HPS § 3(b)(1)(C). However, Congress did not indicate that no fee should be charged for placards. The regulations under the HPS are also to the same effect. *See* 23 C.F.R. §§ 1235.3, 1235.6. These hortatory suggestions by Congress might be one reason that California has not chosen to impose a fee for the special license plates. It also suggests that Congress did not see anything particularly discriminatory in the exaction of a small fee for the issuance of placards, if any were issued at all.

As it is, California has decided to confer upon disabled people the still further benefit of a system under which they can drive or be driven in any automobile at all, and still use the special parking places, as well as take advantage of other special parking benefits. That is, California did set up an optional flexible placard program. That complemented the already optional enforcement program which was designed to assure that spaces would not only be provided, but also that they would remain

available. As I see it, nothing in the ADA or the regulations precludes California from making a small charge for those additional benefits.

I, of course, recognize that a disabled person can argue that he does not really care at all about having a vigorous enforcement program, which greatly enhances the opportunities of all disabled people to use the special parking places, and even helps make it possible to confer still further parking privileges upon them. In other words, a disabled person could say, "Fine, just set aside and mark the spaces, but do not force any additional benefits upon me, even at a nominal cost." I do not see any reason to believe that Congress did, or that California or we need to, take that kind of reasoning seriously.

Moreover, I fail to see how a charge of twenty-five cents per month, which accords all of those benefits above and beyond the bare provision of spaces, can be dubbed a violation of the ADA on the theory that the costs of state programs that are required to preclude discriminatory treatment have been placed upon disabled persons. No cost of a generally available program has been so levied; rather an expanded ability to use the special parking spaces has been afforded. With or without enhancement, the spaces remain, and even they are one step removed from any particular state program as such.

In short, the placard enhancement allows for great flexibility in the use of the special spaces, affords even further parking opportunities, and helps assure that the spaces will actually be available for those who need them. The fact that a disabled person, who does not have a car of his own or a car which is used for disabled

people most of the time, needs to pay what amounts to twenty-five cents per month to be able to use the special spaces does not put the cost of the parking space program upon him; it only visits a minute part of the cost of the enhancement upon him.

That being said, what of the district court cases which are to the contrary? *See Thompson v. Colorado*, 29 F.Supp.2d 1226, 1231-32 (D.Colo.1998); *Duprey v. Connecticut*, 28 F.Supp.2d 702, 709-11 (D.Conn.1998); *Thrope v. Ohio*, 19 F.Supp.2d 816, 824-25 (S.D.Ohio 1998); *McGarry v. Director, Dep't of Revenue*, 7 F.Supp.2d 1022, 1027-29 (W.D.Mo.1998). Those cases appear to presume either that some form of enforcement is required, or that the state has chosen to enhance the availability of spaces and that is the state's problem. *See, e.g., Thompson*, 29 F.Supp.2d at 1232; *Duprey*, 28 F.Supp.2d at 709. As already noted, I see no violation centered on the fact that a state has exacted a small charge for the purpose of enhancing the benefits available to disabled persons beyond those absolutely required by law. I, therefore, do not accept that particular form of reasoning. The district court cases also note that without placards the program could not be as flexible as it is because, for example, a disabled person who is being driven in another person's car could not confer the right to park in a special space upon the driver. *See, e.g. Thrope*, 19 F.Supp.2d at 825; *McGarry*, 7 F.Supp.2d at 1028. Moreover, they say, a disabled person may wish to rent or borrow a car, which did not have a special license plate, and would not have access to a special space in that instance. And, they say, free license plates do not help in

those regards.[1] *See id.* Again, that puts the cart before the horse. It assumes that the state must not only make spaces available, but also provide for all possible permutations of desire to use those spaces, without asking for any fee to help defray the cost of the enhanced usage possibilities. I see no persuasive basis for that assumption. It simply fails to recognize that the states are not discriminating against disabled people when they undertake to police the use of spaces, nor are they discriminating when they ask for a small fee to enable them to do that policing in an efficient fashion. There is, by the way, nothing before us to suggest that the fee exceeds that which the DMV charges other people for services it performs for them, or that the fee is in an excessive or discriminatory amount whose design injures disabled people. Far from it. The fee does not even cover the cost of issuing the placards.[2]

In fine, the ADA is an anodyne which serves to assuage some of the sufferings of disabled persons.

---

[1] It is interesting to note that a somewhat ambiguous opinion letter from the DOJ suggested that a free license plate program was a satisfactory alternative to a placard program. *See* DOJ Opinion Letter from Deval L. Patrick, Assistant Attorney General, Civil Rights Division to Congressman C.W. Bill Young, (Apr. 29, 1996). I, however, do not put any significant weight upon that missive.

[2] The best argument against this small and reasonable placard fee is, it seems to me, that there are some disabled people who can drive most cars and who wish to borrow or rent cars from time to time. They are, I believe, the only ones who can reasonably complain at all about the fee in any event. But even if the fee were invalid as applied to them, that would not justify the breadth of the injunction issued by the district court and approved of today.

California does not disagree with that general goal, and insists that it did not deprive disabled persons of any rights when it imposed a nominal fee upon those who sought to obtain parking placards, which provide great flexibility in the use of the special parking spaces that California has already made available. I agree with that assessment of the situation, and determine that the district court abused its discretion when it issued the permanent injunction against the DMV.

In reaching my conclusion, I limit myself to the facts at hand – a fee that comes to twenty-five cents per month to help defray the cost of issuing the placard. I do not reflect upon whether the state could charge a vastly greater sum for the placards. Nor do I consider other programs or fees charged for them. Nor, for that matter, do I consider whether the federal government can constitutionally impose program costs upon the states in this fashion. As I see it, those issues are, for now, beyond our ken.[3]

Thus, I respectfully dissent.

---

[3] It should be pointed out, however, that one Court of Appeals and at least one District Court have declared that an attempt to enforce the surcharge regulation in federal court violates the Eleventh Amendment. *See Brown v. North Carolina Div. of Motor Vehicles*, 166 F.3d 698, 706-08 (4th Cir.1999); *Hedgepeth v. Tennessee*, 33 F.Supp.2d 668, 674-77 (W.D.Tenn.1998); *see also Alsbrook v. City of Maumelle*, 184 F.3d 999, 1009 (8th Cir.1999) (en banc). *But cf., Clark v. California*, 123 F.3d 1267, 1269-71 (9th Cir.1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 2340, 141 L.Ed.2d 711 (1998). Again, I see no need to decide that issue in this case. If I did, I am inclined to agree with those courts rather than with the majority.

DAVIS WRIGHT TREMAINE
1000 WILSHIRE BOULEVARD
SUITE 600
LOS ANGELES, CALIFORNIA 90017
TELEPHONE (213) 633-6800
FAX (213) 633-6899

Andrew R. Hall (CA SBN 125773)
Mary H. Haas (CA SBN 149770)

OF COUNSEL:
PETERSON & MYERS, P.A.
J. Davis Connor (FL SBN 0714313)
Stephen R. Senn (FL SBN 0833878)
P.O. Box 24628
Lakeland, FL 33802
(941) 683-6511

ANTONELLO & FEGERS, P.A.
Robert Antonello (FL SBN 0259977)
P.O. Box 7692
Winter Haven, FL 33883
(941) 294-2898

Attorneys for Plaintiffs
WILLIAM ROBERT DARE and GARY PETILLO

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WILLIAM ROBERT DARE and GARY PETILLO, Plaintiffs, vs. STATE OF CALIFORNIA, DEPARTMENT OF MOTOR VEHICLES, Defendant.	Case No. 96-5569 LEW (ANx) CLASS ACTION COMPLAINT FOR (1) DECLARATORY AND INJUNCTIVE RELIEF; AND (2) REIMBURSEMENT JURY TRIAL DEMANDED (Filed Aug. 13, 1996)

COMPLAINT

Plaintiffs William Robert Dare, and Gary Petillo, on behalf of themselves and all others similarly situated, sue Defendant, State of California, Department of Motor Vehicles, and allege as follows:

General Allegations

1. Plaintiff William Robert Dare is a natural person and a resident of the city of Carson, in Los Angeles County, California.

2. Plaintiff Gary Petillo is a natural person and a resident of the city of Long Beach, in Los Angeles County, California.

3. Defendant, State of California, Department of Motor Vehicles ("Defendant"), is the principal administrative unit within the executive branch of the State of California for the administration of California Vehicle Code Section 22511.5, *et seq.* which provides for "distinguishing placards" which may be used in lieu of special identification license plates for persons with disabilities. Defendant is a governmental organization with the capacity to sue and be sued, and is the proper party defendant with respect to the issues raised in this proceeding.

4. This Court has jurisdiction of this action pursuant to 28 U.S.C. § 1331, as Plaintiffs seek enforcement of rights provided by federal law through the Americans with Disabilities Act of 1990.

5. Venue is proper in the United States District Court for the Central District of California as each representative Plaintiff resides in Los Angeles County, California and each was unlawfully required by Defendant to make payments of money in this District. In addition, many thousands of members of the class on whose behalf this cause is brought reside in this District, and were unlawfully required to make the payments at issue in this litigation within this District. Accordingly, a substantial part of the events giving rise to the claim occurred in this District. In addition, the Defendant has offices located in this District. For each of these reasons, venue is proper in this Court pursuant to 28 U.S.C. § 1391.

6. At all times pertinent to the issues involved in this proceeding, and from a date well in advance of the pertinent time period, the laws of the State of California as administered by Defendant have provided for the issuance of distinguishing placards for persons who suffer disabilities which severely limit their mobility or who are severely visually impaired. The criteria by which to determine whether the limitations on mobility are sufficiently severe as to allow issuance of a distinguishing placard are codified at California Vehicle Code ("CVC") Section 22511.55, *et seq.*

7. Distinguishing placards allow the holder various parking accommodations which include the ability to park in specially designated parking spaces set aside for the exclusive use of persons with disabilities. Distinguishing placards are also available to organizations or individuals upon a suitable showing that the person or organization provides transportation services to persons with disabilities under CVC Section 22511.55(a)(5).

8. Distinguishing placards for persons with disabilities expire every two years on the 30th of June unless renewed by that date. CVC Section 22511.55(a).

9. In order to receive a distinguishing placard, persons with disabilities sufficiently severe as to satisfy the criteria described in the California Vehicle Code must also pay a fee to Defendant in the amount of $6.00. An additional fee of $6.00 must be paid upon each renewal of a distinguishing placard, or upon the replacement of any distinguishing placard which is lost or stolen. CVC Section 22511.55(a).

10. Since the January 26, 1992 effective date of applicable provisions of the Americans with Disabilities Act of 1990, special parking considerations for persons with disabilities, so as to allow reasonably equivalent access to public and private facilities, have been mandated by the Americans with Disabilities Act and by regulations developed and promulgated by the United States Department of Justice under authority of that Act. The reservation of parking places for the exclusive use of persons with disabilities, which places are located close to the entrance of private and public buildings, facilities, or accommodations (and which often must be fitted with ramps), is essential if persons with disabilities are to be allowed equal access to public and private buildings and facilities.

11. The requirement that special parking places be set aside for persons with disabilities, and other requirements of the Americans with Disabilities Act designed to enrich the lives of persons with disabilities by protecting them from discrimination and from various barriers to

participation in society, were imposed on State and local governments and on private entities based upon the following specific findings of the United States Congress:

> (1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;
>
> (2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
>
> (3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;
>
> (4) unlike other individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;
>
> (5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

42 U.S.C. § 12101(a).

Class Action Allegations

12. This suit is brought on behalf of all purchasers of distinguishing placards enabling use of parking

accommodations set aside for the exclusive use of persons with disabilities since the effective date of the pertinent provisions of the Americans with Disabilities Act, including both purchasers of original distinguishing placards, purchasers of renewal or replacement distinguishing placards, and those who in the future will be required to pay fees for such distinguishing placards until preliminary or final injunctive relief restrains Defendant from further collections of these fees. This group, as described, will be hereafter referenced as "the class."

13. The class is so numerous that joinder of all members is impracticable. Although the precise number of persons and organizations who have been required to pay Defendant for distinguishing placards (original replacements and renewal) is not known, the class is roughly estimated to be in excess of several hundred thousand persons and organizations. Additional class members accrue each day as Defendant continues to require payment of the unlawful fee before issuing distinguishing placards (original, renewal, or replacement) allowing the use of parking spaces set aside for persons with disabilities.

14. There are common questions of law and fact shared by all parties. Indeed, all of the issues pertinent to liability are identical as to all class members, and all class members equally seek as their remedy declaratory and injunctive relief, along with reimbursement of past fees which were unlawfully charged and collected by Defendant.

15. The specific legal issue raised by this case is whether the charges imposed by Defendant for distinguishing placards are in violation of the Americans with Disabilities Act. This issue is raised on behalf of and is common to each and every class member.

16. In addition, the class members have in common all facts which are pertinent to the legal issue raised, as all class members: (1) have (or transport persons who have) impairments as described by California Vehicle Code Section 22511.5, *et seq.;* (2) have disabilities (or transport persons with disabilities) within the meaning of the Americans with Disabilities Act, and so are qualified individuals with disabilities who enjoy the protections of that Act; (3) have been or will in the future be required to purchase distinguishing placards issued by Defendant; and (4) have been or will be required to pay Defendant in order to receive distinguishing placards allowing use of parking spaces set aside for the exclusive use of persons with disabilities.

17. The claims of the representative parties are typical of the claims of the class. Each representative class member: (1) satisfies the criteria for a [sic] distinguishing placards as described in California Vehicle Code Section 22511.5, *et seq.;* (2) is a qualified individual with a disability and so within the protection of the Americans with Disabilities Act; and (3) has been required to pay money to Defendant in order to receive a permit allowing use of parking spaces set aside for persons with disabilities.

18. Plaintiff William Robert Dare satisfies the criteria for parking permit under California Vehicle Code Section 22511.55, *et seq.* and is a qualified individual with a disability under the protection of the Americans with Disabilities

Act in that Mr. Dare is a quadriplegic and suffered the loss of his upper and lower limbs after an automobile accident. Mr. Dare is not able to drive a vehicle, and relies upon the use of a wheel chair. Mr. Dare owns a vehicle that is driven by another person. Mr. Dare has purchased distinguishing placards since 1990 for the price required by Defendant and has always been required to pay for such placards. Mr. Dare will continue to have to purchase distinguishing placards and will be required to pay for renewal prior to June 30, 1997 when the current distinguishing placards expires unless this Court restrains Defendant from further collection of these fees.

19. Plaintiff Gary Petillo satisfies the criteria for a parking permit under California Vehicle Code Section 22511.55, *et seq.* and is a qualified person with a disability under the protection of the Americans with Disabilities Act in that Mr. Petillo is a quadriplegic and suffered the loss of upper and lower limbs from complications after a diving accident. Mr. Petillo is able to drive a vehicle which has been modified in order to accommodate his disability, and otherwise relies upon the use of a wheel chair. Mr. Petillo has purchased distinguishing placards since 1991 for the price required by Defendant, and has always been required to pay for such placards and will continue to have to pay for such permits on future renewals unless this Court restrains Defendant from further collection of these fees.

20. Each of the representative plaintiffs are motivated and able to enforce the rights of disabled persons through this lawsuit and will fairly and adequately protect the interests of the class. The representative plaintiffs

have retained the undersigned attorneys, who are competent to represent the class on the issues presented in this action.

21. Prosecution of multiple actions in different State and Federal courts by individual class members creates an unnecessary risk of inconsistent or varying adjudications, which could impose incompatible standards of conduct for Defendant.

22. Prosecution of multiple actions in different State and Federal courts by individual class members creates an unnecessary risk of an adjudication which would, as a practical matter, dispose of the issues and interests of nonparties through the precedent which would be set by the first court to consider whether the fees charged by Defendant are lawful.

23. Defendant, in charging fees as a condition of issuing distinguishing placards allowing class members to park in spaces set aside for persons with disabilities, has acted in a manner generally applicable to all members of the class, and it is appropriate that the declaratory and injunctive relief requested in this litigation be for the benefit of the class as a whole.

24. Questions of law and fact which are shared by all class members predominate over any questions that are specific to only some class members. In addition, a class action is far superior to any other manner of resolving this controversy because of the size of the class, the relatively small monetary damage suffered by any particular class member, the predominance of legal issues over issues of fact, and the need for the dispositive resolution of this controversy in a single forum so that the rights of

the class members are secured and so that Defendant can know and comply with its legal responsibilities.

Count One

(Declaratory and Injunctive Relief)

25. This action seeks declaratory and injunctive relief pursuant to the Americans with Disabilities Act of 1990.

26. Plaintiffs restate the allegations made in paragraph 1 through 24.

27. Defendant has been charging and continues to charge members of the class $6.00 for each distinguishing placard, and additional payments of $6.00 for each renewal, and for each replacement placard.

28. The charges which have been exacted from the class members for these distinguishing placards, and which Defendant continues to exact from the class members for these distinguishing placards, is in violation of the Americans with Disabilities Act of 1990 and regulations issued by the United States Department of Justice pursuant to this Act. As stated in the Act: "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefit of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

29. Particularly pertinent to the issue raised in this litigation is the following regulation developed and promulgated by the Department of Justice:

> A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act of this part.

28 C.F.R. 35.130(f) (1994). This regulation carries the force of law and Defendant is obligated to comply with the requirements of this regulation.

30. Special parking accommodations set aside for persons with disabilities are required of both public and private entities by the Americans with Disabilities Act and the regulations and guidelines issued by the United States Department of Justice as authorized by the Americans with Disabilities Act. *See generally* 28 C.F.R. § 36.304 (1994); *ADA Accessibility Guidelines for Buildings and Facilities,* located at Appendix A to 28 C.F.R. ch. I pt. 36 (1994).

31. Defendant will continue to require payments for distinguishing placards permitting persons with disabilities to use the parking places reserved for the exclusive use of persons with disabilities unless and until this Court declares that such charges are unlawful and enjoins Defendant from continuing to charge a fee for such permits.

32. As a result of Defendant's unlawful acts in charging for distinguishing placards allowing use of special parking places set aside for the exclusive use of persons with disabilities, the class (through its representative parties) has been required to retain the undersigned attorneys, and is obligated to pay them a fee for

their services upon the successful resolution of this claim, and is entitled to payment of such fees and attendant costs from Defendant pursuant to the Americans with Disabilities Act.

33. Wherefore, Plaintiffs William Robert Dare and Gary Petillo, on behalf of themselves and all others similarly situated, request that the Court enter judgment in their favor and against Defendant, State of California, Department of Motor Vehicles: (1) declaring that it is unlawful for Defendant to require payment for distinguishing placards allowing the use of special parking places set aside for disabled persons; (2) enjoining Defendant from requiring payment from future applicants for distinguishing placards allowing the use of special parking places set aside for disabled persons; and (3) awarding Plaintiffs payment of attorneys' fees and costs of litigation.

Count Two

(Reimbursement)

34. This action seeks reimbursement or repayment of monies unlawfully charged and collected by Defendant from qualified individuals with disabilities in violation of the Americans with Disabilities Act of 1990.

35. Plaintiffs restate and incorporate by this reference the allegations made in paragraphs 1 through 25, and 27 through 32.

36. As a result of Defendant's acts in unlawfully requiring and continuing to require payments from class members for distinguishing placards allowing the use of

parking spaces set aside for persons with disabilities, each class member has suffered and will suffer monetary damages in the amount of the unlawful exaction.

37. Complete relief to the members of the class for Defendant's violation of the class members' rights under the Americans with Disabilities Act requires that Defendant repay with interest all sums unlawfully charged for distinguishing placards allowing access to parking spaces reserved for the exclusive use of persons with disabilities.

38. Wherefore Plaintiffs William Robert Dare and Gary Petillo on behalf of themselves and all others similarly situated, ask that the Court enter judgment in their favor and against Defendant, State of California, Department of Motor Vehicles: (1) directing reimbursement or repayment to each class member of the amounts charged the class member for a distinguishing placard or placard renewal or replacement since the effective date of the Americans with Disabilities Act, plus prejudgment interest at the legal rate; and (2) awarding Plaintiffs payment of attorneys' fees and costs of litigation.

PRAYER

Wherefore, Plaintiffs pray that this Court enter judgment in favor of Plaintiffs on behalf of themselves and all others similarly situated, and against Defendant, State of California, Department of Motor Vehicles as follows:

1. On the First cause of action:

> (a) declaring that it is unlawful for Defendant to require payment for distinguishing placards allowing the use of special parking places set aside for disabled persons;

(b) enjoining Defendant from requiring payment from future applicants for distinguishing placards allowing the use of special parking places set aside for disabled persons; and

(c) awarding Plaintiffs payment of attorneys' fees and costs of litigation; and

2. On the Second Cause of Action:

(a) directing reimbursement or repayment to each class member of the amounts charged the class member for a distinguishing placard or placard renewal or replacement since the effective date of the Americans with Disabilities Act, plus prejudgment interest at the legal rate; and

(b) awarding Plaintiffs payment of attorneys' fees and costs of litigation.

JURY DEMAND

Plaintiffs demand a trial by jury on all issues so triable.

DATED: August 13, 1996

Respectfully submitted.

DAVIS WRIGHT TREMAINE
Andrew R. Hall
Mary H. Haas

By: /s/ Andrew R. Hall
Andrew R. Hall
Attorneys for Plaintiffs
William Robert Dare
and Gary Petillo

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WILLIAM ROBERT DARE AND GARY PETILLO, Plaintiffs, v. STATE OF CALIFORNIA, DEPARTMENT OF MOTOR VEHICLES, Defendants.	CV96 – 5569 JSL PARTIAL SUMMARY JUDGMENT (Filed May 30, 1997) (Entered June 4, 1997)

The motion of plaintiffs William Robert Dare and Gary Petillo for partial summary judgment and defendants' motion for summary judgment were decided without hearing on May 19, 1997. Having reviewed the papers filed in connection with this matter, and being fully apprised of the relevant facts and law, IT IS HEREBY ORDERED AND ADJUDGED that:

1. The motion for partial summary judgment of plaintiffs William Robert Dare and Gary Petillo be GRANTED. In reaching this decision, the Court incorporates into this Order the findings of fact and conclusions of law as set forth in the Plaintiffs' Motion for Partial Summary Judgment in paragraphs 1 through 15 on pages two through six, excluding paragraph 12 which the Court does not adopt at this time.

California's requirement of a biennial fee of $6.00 for placards that permit the use of parking spaces reserved for persons with disabilities violates the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101, et. seq.

"ADA"), as implemented by the Justice Department regulations promulgated at 28 C.F.R. § 35.130(f). The fee is a prohibited surcharge under the ADA because it shifts solely to persons with disabilities "the costs of measures . . . that are required to provide . . . the nondiscriminatory treatment required by" the ADA. § 35.130(f). The ADA in its entirety, and as embodied in this regulation, is designed to integrate the approximately 43,000,000 Americans with disabilities into public life. Charging an entry fee for this inclusion runs contrary to the core principle of the ADA: that persons with disabilities are full and equal citizens.

The ADA mandates that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefit of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. The ADA requires the creation and maintenance of special parking accommodations set aside for persons with disabilities. *See generally* 28 C.F.R. § 36.304 (1994); *ADA Accessibility Guidelines for Buildings and Facilities*, located at Appendix A to 28 C.F.R. Ch. 1, pt. 36 (1994).

In issuing these regulations, Congress has expressly determined that the designation of reserved parking spaces is necessary for persons with mobility disabilities to have access to a countless number of public buildings and the services, programs, and activities that are housed in those buildings. In doing so, Congress has implicitly determined that if persons with mobility disabilities are required to travel between the parking places otherwise available to them and their ultimate destination, they are

effectively denied equal access to those facilities. Plaintiffs correctly contend that from this premise, it necessarily follows that access to the designated disability parking places must be equal and without costs to every person who falls within the class that Congress intended to protect.

Although somewhat obscured by the arguments in this case, the underlying legal issue to be resolved is the amount of discretion that Congress left the states when it passed the ADA and the ADA's requirements of reserved parking spaces for the disabled. The State is correct in stating that the ADA does not mandate any specific parking enforcement system. The ADA does mandate, however, that states do not either deny or charge for the access to which persons with disabilities are entitled.

Through the ADA, Congress has defined a class of persons who are entitled to disability parking. The State of California has selected an enforcement method for keeping persons not in the congressionally defined class from using the reserved parking that denies access to everyone (including those in the defined class) unless they have a special license plate or placard. While it is permissible to use denial of access to restrict the use of the reserved parking mandated by the ADA, a state may only do so if its enforcement system does not deny access to those entitled to use the parking under the ADA, and if the state does not charge any such individual for access.

Accordingly, the Court is not concluding that the ADA mandates that every state provide free placards for persons with disabilities. The Court is specifically holding that California's system of enforcing the ADA by

restricting access to disability parking places to those with either special license plates or placards, and charging a fee for the placards, violates the ADA. California's enforcement system violates the ADA because individuals must pay a fee to use disability parking spaces that they are entitled to use under the ADA.

The State of California has chosen to limit access to reserved parking spaces to persons within the class protected by Congress who obtain the requisite form of visual display for their vehicle (either a disability license plate or placard). These visual displays make it easier for law enforcement officials to ascertain that individuals have a right to use the reserved spaces. The use of visual displays to restrict access to reserved parking does not violate the ADA *per se*. To the contrary, properly structured, such enforcement mechanisms advance the goals of the ADA by ensuring that the reserved spaces are actually available for those who need them.

However, to comply with the ADA, an enforcement system that restricts access to disability parking to those who obtain a visual display must, at a minimum, satisfy three criteria:

1) the visual display must be free, or be provided at no greater cost than any comparable display required for the able-bodied;

2) the visual display must be available to the entire class protected by the ADA's provisions requiring reserved parking; and

3) the visual display must allow for the degree and flexibility of access to parking required by the ADA.

California's visual display enforcement system does not satisfy these criteria. Although disability placards meet the second and third criteria, California charges persons with disabilities a fee to obtain them. Although it provides disability license plates at no additional charge, these license plates do not provide the level of access required by the second and third criteria.

To obtain a license plate, an individual with a disability must own a registered motor vehicle. The plates are not portable, they cannot be moved from car to car. Due to these limitations, the license plates 1) do not provide access to reserved parking to *all of the individuals* who are entitled to such parking under the ADA and 2) do not provide the individuals who can obtain license plates with *all of the types* of access to such parking to which they are entitled.

In California, individuals who do not own a vehicle must pay for a placard to access any disability parking space. Alternatively, individuals who do own a vehicle are required to pay for a placard to enjoy the full range of access that they are entitled to under the ADA. Persons with disabilities, like persons without disabilities, sometimes drive cars other than the one or ones that they own. For example, without a placard, a businessperson with a license plate would be able to park her car in a handicap parking space at LAX, but unable to use handicap parking spaces while driving a rental car in San Francisco.

Moreover, both disabled car-owners and non car-owners are often passengers in other people's cars. Since license plates are not portable, a disabled person must buy a placard if they wish to travel as a passenger in

anyone else's car and use disability parking. A placard would be required by a disabled person who needed a friend to drive him on errands once a week or by a worker who wanted to carpool downtown. The need for reserved parking is the same for drivers as it is for passengers. Reserved parking addresses the difficulty of getting efficiently and safely from a parking lot to a building or pedestrian route or area, not the obstacles of traveling across thoroughfares to a destination. Once the car has stopped, driver and passenger face the same challenge: getting out of the parking lot.

The State's arguments that by providing free license plates it has chosen to aid those who are most in need, disabled *drivers*, through its system, rests on an inapt inference and a principle that is totally at odds with the ADA. The division created between those who can receive a license and those who cannot, a division between car owners and non-owners, is not equivalent to a division between drivers and passengers. Some disabled car owners, such as one of the name plaintiffs, have disabilities which prevent them from driving at all. They are always passengers. Some non-owners are able to and do drive cars owned by friends or family members, or which they rent for business or pleasure. The fact that they do not own a car may be due to their financial situation.

The ADA does not allow states to sort among groups of disabled persons and help only those which it, in this case incorrectly, believes to have greater needs. The ADA entitles individuals, and not groups or sub-groups, to the rights of access and to be free from discrimination. The ADA provision relevant to this action states that "no

qualified *individual* with a disability" shall be excluded from participation or be subjected to discrimination. 42 U.S.C. § 12132. The State does not satisfy the ADA by selecting among individuals protected by the ADA by providing free access only to the places and for the uses that the State deems that the disabled should most appreciate.

The main premise of the State's argument, that disabled passengers are advantaged as to disabled drivers because they "can be let out at the door," fails to recognize that the focus of the ADA is upon the disabled individuals. The purpose of the ADA is, within the limit of reasonableness, to put each individual with a disability in the same position as the able-bodied in navigating their way through public life. As much as is reasonably possible, the ADA is an effort to give persons with disabilities the level and flexibility of access to public facilities that the able-bodied enjoy. This includes, with regards to reserved parking spaces, making the disabled as free as the able-bodied to go to a convenience store on a whim, rather than waiting to track down a chauffeur, or to enjoy the safety and company of their date as they park and journey to the cinema door, rather than being stranded at the entrance while their date searches for parking.

It is this type of flexibility and control over one's life that allows for economic and personal self-sufficiency. As evidenced by the nominal amount of the fee, parking placards are an extremely inexpensive accommodation that provides persons with disabilities with a much greater level of participation in public life. Persons with disabilities are entitled to that greater access by the ADA

and, therefore, the State can not charge them a fee in order to secure it.

2. IT IS FURTHER HEREBY ORDERED that the plaintiffs' motion for summary judgment be granted only as to the second class of plaintiffs certified by the Court by order dated January 31, 1997:

> All purchasers of distinguishing placards pursuant to California Vehicle Code § 22511.55 since January 26, 1992, who are disabled under the Americans with Disabilities Act, and all persons who will in the future be required to pay money for such placards, who are disabled under the Americans with Disabilities Act, until and unless declaratory and injunctive relief protects against the requirement of payment as a condition of access to parking accommodations reserved for persons with disabilities.

Order Denying Defendants' Motion to Dismiss And Granting Plaintiff's Motion for Class Certification (Filed January 31, 1997.)

The judgment is not ordered as to the first class because this class includes individuals who have no standing under the ADA. The statutorily defined class of people who may purchase placards in California includes persons who would not meet the very specific and individualized definition of disability under the ADA.

The Court has considered and rejects the plaintiffs' argument that persons who qualify for placards are "perceived" as having a disability under the ADA. This broader definition of disability is meant to protect persons who are, in fact, not disabled, from discrimination based on stereotypes or prejudice based on disability. It

has no application to an aspect of a state program that goes further than the ADA requires in providing access to citizens with impaired mobility.

3. IT IS FURTHER HEREBY ORDERED that the State be enjoined from requiring payment from future applicants for placards that permit the use of parking places reserved for people with disabilities.

4. IT IS FURTHER HEREBY ORDERED that the defendant's motion for summary judgment be DENIED.

5. The Court reserves jurisdiction to resolve the issues presented in Count II of the Complaint and to determine whether attorneys' fees should be awarded in this case.

The Court may amend or amplify this order with a more specific statement of the grounds for its decision.

IT IS SO ORDERED.

DATED: 5/30/97

/s/ J. Spencer Letts
J. Spencer Letts
United States District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM ROBERT DARE; GARY PETILLO, Plaintiffs-Appellees, v. STATE OF CALIFORNIA; DEPT. OF MOTOR VEHICLES, Defendants-Appellants.	NO. 97-56065 DC NO. CV-96-05569-JSL-ANx ORDER (Filed Oct. 27, 1999)

Before: D.W. Nelson, Fernandez and W. Fletcher, Circuit Judges.

The panel voted unanimously to deny the petition for rehearing. Judges Fernandez and W. Fletcher voted to reject the suggestion for rehearing en banc, and Judge D.W. Nelson so recommended.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed.R.App.P.35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

January 18, 2000

Mr. Bill Lockyer
1300 I Street
Suite 1740
Sacramento, CA 95814

Re: California, et al.
v. William Robert Dare, et al.
Application No. 99A582

Dear Mr. Lockyer:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice O'Connor, who on January 18, 2000, extended the time to and including February 24, 2000.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By /s/ Melissa A. Blalock
Melissa A. Blalock
Assistant Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

NOTIFICATION LIST

Mr. Bill Lockyer
1300 I Street
Suite 1740
Sacramento, CA 95814

Mr. Andrew R. Hall
Davis, Wright, et al.
865 South Figueroa St., #2400
Los Angeles, CA 90017-2566

Mr. J. Davis Connor
Peterson & Myers, P.A.
P.O. Box 24628
Lakeland, FL 33802

Mr. Robert Antonello
Antonello & Fegers, P.A.
P.O. Box 7692
Winter Haven, FL 33883

Clerk
United States Court of Appeals for
the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Public Law 100-641

SEC. 3. HANDICAPPED PARKING SYSTEM.

(a) REGULATIONS. – Not later than the 180th day following the date of the enactment of this Act, the Secretary of Transportation shall issue regulations –

(1) which establish a uniform system for handicapped parking designed to enhance the safety of handicapped individuals, and

(2) which encourage adoption of such system by all the States.

In issuing such regulations, the Secretary shall consult the States.

(b) DEFINITIONS – For purposes of this section –

(1) UNIFORM SYSTEM FOR HANDICAPPED PARKING – A uniform system for handicapped parking designed to enhance the safety of handicapped individuals is a system which –

(A) adopts the International Symbol of Access (as adopted by Rehabilitation International in 1969 at its 11th World Congress on Rehabilitation of the Disabled) as the only recognized symbol for the identification of vehicles used for transporting individuals with handicaps which limit or impair the ability to walk;

(B) provides for the issuance of license plates displaying the International Symbol of Access for vehicles which will be used to transport individuals with handicaps which limit or impair the ability to walk, under criteria determined by the State;

(C) provides for the issuance of removable windshield placards (displaying the International Symbol of Access) to individuals with handicaps which limit or impair the ability to walk, under criteria determined by the State;

(D) provides that fees charged for the licensing or registration of a vehicle used to transport individuals with handicaps do not exceed fees charged for the licensing or registration of other similar vehicles operated in the State; and

(E) for purposes of easy access parking, recognizes licenses and placards displaying the International Symbol of Access which have been issued by other States and countries.

(2) STATE – The term "State" has the meaning such term has when used in chapter 4 of title 23, United States Code.

Approved November 9, 1988.

---

42 U.S.C. § 12101. Findings and purpose

(a) Findings

The Congress finds that –

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and,

despite some improvements such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced

with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter –

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards

established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

---

42 U.S.C. § 12131. Definitions

As used in this subchapter:

(1) Public entity

The term "public entity" means –

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 502(8) of Title 45).

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary

aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

---

42 U.S.C. § 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

---

42 U.S.C. § 12133. Enforcement

The remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

---

42 U.S.C. § 123134. Regulations

(a) In general

Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not

include any matter within the scope of the authority of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.

(b) Relationship to other regulations

Except for "program accessibility, existing facilities", and "communications", regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of Title 29. With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under section 794 of Title 29.

(c) Standards

Regulations under subsection (a) of this section shall include standards applicable to facilities and vehicles covered by this part, other than facilities, stations, rail passenger cars, and vehicles covered by part B of this subchapter. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204(a) of this title.

(Pub.L. 101-336. Title II, § 204, July 26, 1990, 104 Stat. 337.)

23 C.F.R. § 1235.1 Purpose.

The purpose of this part is to provide guidelines to States for the establishment of a uniform system for handicapped parking for persons with disabilities to enhance access and the safety of persons with disabilities which limit or impair the ability to walk.

---

23 C.F.R. § 1235.2 Definitions

Terms used in this part are defined as follows:

(a) International Symbol of Access means the symbol adopted by Rehabilitation International in 1969 at its Eleventh World Congress on Rehabilitation of the Disabled.

(b) Persons with disabilities which limit or impair the ability to walk means persons who, as determined by a licensed physician:

(1) Cannot walk two hundred feet without stopping to rest; or

(2) Cannot walk without the use of, or assistance from, a brace, cane, crutch, another person, prosthetic device, wheelchair, or other assistive device; or

(3) Are restricted by lung disease to such an extent that the person's forced (respiratory) expiratory volume for one second, when measured by spirometry, is less than one liter, or the arterial oxygen tension is less than sixty mm/hg on room air at rest; or

(4) Use portable oxygen; or

(5) Have a cardiac condition to the extent that the person's functional limitations are classified in severity as Class III or Class IV according to standards set by the American Heart Association; or

(6) Are severely limited in their ability to walk due to an arthritic, neurological, or orthopedic condition.

(c) Special license plate means a license plate that displays the International Symbol of Access:

(1) In a color that contrasts to the background, and

(2) In the same size as the letters and/or numbers on the plate.

(d) Removable windshield placard means a two-sided, hanger-style placard which includes on each side:

(1) The International Symbol of Access, which is at least three inches in height, centered on the placard, and is white on a blue shield;

(2) An identification number;

(3) A date of expiration; and

(4) The seal or other identification of the issuing authority.

(e) Temporary removable windshield placard means a two- sided, hanger-style placard which includes on each side:

(1) The International Symbol of Access, which is at least three inches in height, centered on the placard, and is white on a red shield;

(2) An identification number;

(3) A date of expiration; and

(4) The seal or other identification of the issuing authority.

---

23 C.F.R. § 1235.3 Special license plates.

(a) Upon application of a person with a disability which limits or impairs the ability to walk, each State shall issue special license plates for the vehicle which is registered in the applicant's name. The initial application shall be accompanied by the certification of a licensed physician that the applicant meets the § 1235.2(b) definition of persons with disabilities which limit or impair the ability to walk. The issuance of a special license plate shall not preclude the issuance of a removable windshield placard.

(b) Upon application of an organization, each State shall issue special license plates for the vehicle registered in the applicant's name if the vehicle is primarily used to transport persons with disabilities which limit or impair the ability to walk. The application shall include a certification by the applicant, under criteria to be determined by the State, that the vehicle is primarily used to transport persons with disabilities which limit or impair the ability to walk.

(c) The fee for the issuance of a special license plate shall not exceed the fee charged for a similar license plate for the same class vehicle.

---

23 C.F.R. § 1235.4 Removable windshield placards.

(a) The State system shall provide for the issuance and periodic renewal of a removable windshield placard, upon the application of a person with a disability which limits or impairs the ability to walk. The State system shall require that the issuing authority shall, upon request, issue one additional placard to applicants who do not have special license plates.

(b) The initial application shall be accompanied by the certification of a licensed physician that the applicant meets the § 1235.2(b) definition of persons with disabilities which limit or impair the ability to walk.

(c) The State system shall require that the removable windshield placard is displayed in such a manner that it may be viewed from the front and rear of the vehicle by hanging it from the front windshield rearview mirror of a vehicle utilizing a parking space reserved for persons with disabilities. When there is no rearview mirror, the placard shall be displayed on the dashboard.

---

23 C.F.R. § 1235.5 Temporary removable windshield placards.

(a) The State system shall provide for the issuance of a temporary removable windshield placard, upon the application of a person with a disability which limits or impairs the ability to walk. The State system shall require

that the issuing authority issue, upon request, one additional temporary removable windshield placard to applicants.

(b) The State system shall require that the application shall be accompanied by the certification of a licensed physician that the applicant meets the § 1235.2(b) definition of persons with disabilities which limit or impair the ability to walk. The certification shall also include the period of time that the physician determines the applicant will have the disability, not to exceed six months.

(c) The State system shall require that the temporary removable windshield placard is displayed in such a manner that it may be viewed from the front and rear of the vehicle by hanging it from the front windshield rearview mirror of a vehicle utilizing a parking space reserved for persons with disabilities. When there is no rearview mirror, the placard shall be displayed on the dashboard.

(d) The State system shall require that the temporary removable windshield placard shall be valid for a period of time for which the physician has determined that the applicant will have the disability, not to exceed six months from the date of issuance.

---

23 C.F.R. § 1235.6 Parking.

Special license plates, removable windshield placards, or temporary removable windshield placards

displaying the International Symbol of Access shall be the only recognized means of identifying vehicles permitted to utilize parking spaces reserved for persons with disabilities which limit or impair the ability to walk.

---

23 C.F.R. § 1235.7 Parking space design, construction, and designation.

(a) Each State shall establish design, construction, and designation standards for parking spaces reserved for persons with disabilities, under criteria to be determined by the State. These standards shall:

(1) Ensure that parking spaces are accessible to, and usable by, persons with disabilities which limit or impair the ability to walk;

(2) Ensure the safety of persons with disabilities which limit or impair the ability to walk who use these spaces and their accompanying accessible routes; and

(3) Ensure uniform sign standards which comply with those prescribed by the "Manual on Uniform Traffic Control Devices for Streets and Highways" (23 CFR part 655, subpart F) to designate parking spaces reserved for persons with disabilities which limit or impair the ability to walk.

(b) The design, construction, and alteration of parking spaces reserved for persons with disabilities for which Federal funds participate must meet the Uniform Federal Accessibility Standards.

---

23 C.F.R. § 1235.8 Reciprocity.

The State system shall recognize removable windshield placards, temporary removable windshield placards and special license plates which have been issued by issuing authorities of other States and countries, for the purpose of identifying vehicles permitted to utilize parking spaces reserved for persons with disabilities which limit or impair the ability to walk.

---

28 C.F.R. § 35.150 Existing facilities.

(a) General. A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This paragraph does not –

(1) Necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities;

(2) Require a public entity to take any action that would threaten or destroy the historic significance of an historic property; or

(3) Require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue

financial and administrative burdens, a public entity has the burden of proving that compliance with § 35.150(a) of this part would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of a public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity.

(b) Methods – (1) General. A public entity may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock or other conveyances, or any other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities. A public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. A public entity, in making alterations to existing buildings, shall meet the accessibility requirements of § 35.151. In choosing among available methods for meeting the requirements of this section, a public entity shall give priority to those

methods that offer services, programs, and activities to qualified individuals with disabilities in the most integrated setting appropriate.

(2) Historic preservation programs. In meeting the requirements of § 35.150(a) in historic preservation programs, a public entity shall give priority to methods that provide physical access to individuals with disabilities. In cases where a physical alteration to an historic property is not required because of paragraph (a)(2) or (a)(3) of this section, alternative methods of achieving program accessibility include –

(i) Using audio-visual materials and devices to depict those portions of an historic property that cannot otherwise be made accessible;

(ii) Assigning persons to guide individuals with handicaps into or through portions of historic properties that cannot otherwise be made accessible; or

(iii) Adopting other innovative methods.

(c) Time period for compliance. Where structural changes in facilities are undertaken to comply with the obligations established under this section, such changes shall be made within three years of January 26, 1992, but in any event as expeditiously as possible.

(d) Transition plan. (1) In the event that structural changes to facilities will be undertaken to achieve program accessibility, a public entity that employs 50 or more persons shall develop, within six months of January 26, 1992, a transition plan setting forth the steps necessary to complete such changes. A public entity shall provide an opportunity to interested persons, including

individuals with disabilities or organizations representing individuals with disabilities, to participate in the development of the transition plan by submitting comments. A copy of the transition plan shall be made available for public inspection.

(2) If a public entity has responsibility or authority over streets, roads, or walkways, its transition plan shall include a schedule for providing curb ramps or other sloped areas where pedestrian walks cross curbs, giving priority to walkways serving entities covered by the Act, including State and local government offices and facilities, transportation, places of public accommodation, and employers, followed by walkways serving other areas.

(3) The plan shall, at a minimum –

(i) Identify physical obstacles in the public entity's facilities that limit the accessibility of its programs or activities to individuals with disabilities;

(ii) Describe in detail the methods that will be used to make the facilities accessible;

(iii) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(iv) Indicate the official responsible for implementation of the plan.

(4) If a public entity has already complied with the transition plan requirement of a Federal agency regulation implementing section 504 of the Rehabilitation Act of 1973, then the requirements of this paragraph (d) shall

apply only to those policies and practices that were not included in the previous transition plan.

---

28 C.F.R. § 35.151 New construction and alterations.

(a) Design and construction. Each facility or part of a facility constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities, if the construction was commenced after January 26, 1992.

(b) Alteration. Each facility or part of a facility altered by, on behalf of, or for the use of a public entity in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities, if the alteration was commenced after January 26, 1992.

(c) Accessibility standards. Design, construction, or alteration of facilities in conformance with the Uniform Federal Accessibility Standards (UFAS) (appendix A to 41 CFR part 101-19.6) or with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG) (appendix A to 28 CFR part 36) shall be

deemed to comply with the requirements of this section with respect to those facilities, except that the elevator exemption contained at section 4.1.3(5) and section 4.1.6(1)(k) of ADAAG shall not apply. Departures from particular requirements of either standard by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided.

(d) Alterations: Historic properties. (1) Alterations to historic properties shall comply, to the maximum extent feasible, with section 4.1.7 of UFAS or section 4.1.7 of ADAAG.

(2) If it is not feasible to provide physical access to an historic property in a manner that will not threaten or destroy the historic significance of the building or facility, alternative methods of access shall be provided pursuant to the requirements of § 35.150.

(e) Curb ramps. (1) Newly constructed or altered streets, roads, and highways must contain curb ramps or other sloped areas at any intersection having curbs or other barriers to entry from a street level pedestrian walkway.

(2) Newly constructed or altered street level pedestrian walkways must contain curb ramps or other sloped areas at intersections to streets, roads, or highways.

28 C.F.R. pt. 36, App. A, 4.1.2

[Diagrams Omitted In Printing]

* * *

(5) (a) If parking spaces are provided for self-parking by employees or visitors, or both, then accessible spaces complying with 4.6 shall be provided in each such parking area in conformance with the table below. Spaces required by the table need not be provided in the particular lot. They may be provided in a different location if equivalent or greater accessibility, in terms of distance from an accessible entrance, cost and convenience is ensured.

Total Parking in Lot	Registered Minimum Number of Accessible Spaces
1 to 25	1
26 to 50	2
51 to 75	3
76 to 100	4
101 to 150	5
151 to 200	6
201 to 300	7
301 to 400	8
401 to 500	9
501 to 1000	2 percent of total
1001 and over	20 plus 1 for each 100 over 1000

Except as provided in (b), access aisles adjacent to accessible spaces shall be 60 in (1525 mm) wide minimum.

(b) One in every eight accessible spaces, but not less than one, shall be served by an access aisle 96 in (2440

mm) wide minimum and shall be designated "van accessible" as required by 4.6.4. The vertical clearance at such spaces shall comply with 4.6.5. All such spaces may be grouped on one level of a parking structure.

EXCEPTION: Provision of all required parking spaces in conformance with "Universal Parking Design" (see appendix A4.6.3) is permitted.

(c) If passenger loading zones are provided, then at least one passenger loading zone shall comply with 4.6.6.

(d) At facilities providing medical care and other services for persons with mobility impairments, parking spaces complying with 4.6 shall be provided in accordance with 4.1.2(5)(a) except as follows:

(i) Outpatient units and facilities: 10 percent of the total number of parking spaces provided serving each such outpatient unit or facility.

(ii) Units and facilities that specialize in treatment or services for persons with mobility impairments: 20 percent of the total number of parking spaces provided serving each such unit or facility.

(e) *Valet parking: Valet parking facilities shall provide a passenger loading zone complying with 4.6.6 located on an accessible route to the entrance of the facility. Paragraphs 5(a), 5(b), and 5(d) of this section do not apply to valet parking facilities.

* * *

28 C.F.R., pt. 36, App. A, 4.6

[Diagrams Omitted In Printing]

4.6 Parking and Passenger Loading Zones.

4.6.1 Minimum Number. *Parking spaces required to be accessible by 4.1 shall comply with 4.6.2 through 4.6.5. Passenger loading zones required to be accessible by 4.1 shall comply with 4.6.5 and 4.6.6.*

4.6.2 Location. *Accessible parking spaces serving* a particular building shall be located on the shortest accessible route of travel *from adjacent parking* to an accessible entrance. *In parking facilities* that do not serve a particular building, *accessible parking* shall be located on the shortest accessible route *of travel* to an accessible pedestrian entrance of the parking facility. *In buildings with multiple accessible entrances with adjacent parking, accessible parking spaces shall be dispersed and located closest to the accessible entrances.*

4.6.3* Parking Spaces. *Accessible* parking spaces shall be at least 96 in (2440 mm) wide. Parking access aisles shall be part of an accessible route to the building or facility entrance and shall comply with 4.3. Two accessible parking spaces may share a common access aisle (see Fig. 9). Parked vehicle overhangs shall not reduce the clear width of an accessible route. *Parking spaces and access aisles shall be level with surface slopes not exceeding 1:50 (2%) in all directions.*

4.6.4* Signage. Accessible parking spaces shall be designated as reserved by a sign showing the symbol of accessibility (see 4.30.7). *Spaces complying with 4.1.2(5)(b) shall have an additional sign "Van-Accessible" mounted below the symbol of accessibility.* Such signs shall be located so they cannot be obscured by a vehicle parked in the space.

4.6.5* Vertical Clearance. *Provide minimum vertical clearance of 114 in (2895 mm) at accessible passenger loading zones and along at least one vehicle access route to such areas from site entrance(s) and exit(s). At parking spaces complying with 4.1.2(5)(b), provide minimum vertical clearance of 98 in (2490 mm) at the parking space and along at least one vehicle access route to such spaces from site entrance(s) and exit(s).*

4.6.6 Passenger Loading Zones. Passenger loading zones shall provide an access aisle at least 60 in (1525 mm) wide and 20 ft(240 in) (6100 mm) long adjacent and parallel to the vehicle pull-up space (see Fig. 10). If there are curbs between the access aisle and the vehicle pull-up space, then a curb ramp complying with 4.7 shall be provided. *Vehicle standing spaces and access aisles shall be level with surface slopes not exceeding 1:50 (2%) in all directions.*

Statutes of California, 1959 Regular Session, Ch. 716

CHAPTER 716

An act to add Section 22511.5 to the Vehicle Code as enacted by the Legislature at its 1959 Regular Session, relating to parking privileges for disabled persons.

[Approved by Governor June 1, 1959. Filed with Secretary of State June 1, 1959.]

The people of the State of California do enact as follows:

SECTION 1. Section 22511.5 is added to the Vehicle Code as enacted by the Legislature at its 1959 Regular Session, to read:

22511.5. Any person who has lost, or has lost the use of, both legs or is so severely disabled as to be unable to move without the aid of a wheelchair shall be allowed to park for unlimited periods in parking zones restricted as to the length of time parking is permitted. This section shall have no application to those zones in which the stopping, parking, or standing of all vehicles is prohibited or which are reserved for special types of vehicles. As a condition to this privilege the vehicle shall display a distinguishing license plate which shall be issued for a vehicle registered to the disabled person, without additional fees, by the Department of Motor Vehicles pursuant to regulations adopted by that department.

CALIFORNIA CIVIL CODE

§ 54. Right to streets, highways, and other public places; disability

(a) Individuals with disabilities have the same right as the general public to the full and free use of the streets, highways, sidewalks, walkways, public buildings, medical facilities, including hospitals, clinics, and physicians' offices, public facilities, and other public places.

(b) "Disability," as used in this part, means any of the following with respect to an individual:

(1) A physical or mental impairment that substantially limits one or more of the major life activities of the individual.

(2) A record of such an impairment.

(3) Being regarded as having such an impairment.

(c) A violation of the right of an individual under the Americans with Disabilities Act of 1990 (Public Law 101-336)[1] also constitutes a violation of this section.

§ 54.1. Access to public conveyances, places of public accommodation, amusement or resort, and housing accommodations

(a)(1) Individuals with disabilities shall be entitled to full and equal access, as other members of the general public, to accommodations, advantages, facilities, medical facilities, including hospitals, clinics, and physicians' offices, and privileges of all common carriers, airplanes, motor vehicles, railroad trains, motorbuses, streetcars, boats, or any other public conveyances or modes of transportation (whether private, public, franchised, licensed, contracted, or otherwise provided), telephone facilities, adoption agencies, private schools, hotels, lodging places, places of public accommodation, amusement, or resort, and other places to which the general public is invited, subject only to the conditions and limitations established by law, or state or federal regulation, and applicable alike to all persons.

(2) As used in this section, "telephone facilities" means tariff items and other equipment and services that have been approved by the Public Utilities Commission to be used by individuals with disabilities in a manner

---

[1] 42 U.S.C.A. § 12101 et seq.

feasible and compatible with the existing telephone network provided by the telephone companies.

(3) "Full and equal access," for purposes of this section in its application to transportation, means access that meets the standards of Titles II and III of the Americans with Disabilities Act of 1990 (Public Law 101-336)[1] and federal regulations adopted pursuant thereto, except that, if the laws of this state prescribe higher standards, it shall mean access that meets those higher standards.

(b)(1) Individuals with disabilities shall be entitled to full and equal access, as other members of the general public, to all housing accommodations offered for rent, lease, or compensation in this state, subject to the conditions and limitations established by law, or state or federal regulation, and applicable alike to all persons.

(2) "Housing accommodations" means any real property, or portion thereof, that is used or occupied, or is intended, arranged, or designed to be used or occupied, as the home, residence, or sleeping place of one or more human beings, but shall not include any accommodations included within subdivision (a) or any single-family residence the occupants of which rent, lease, or furnish for compensation not more than one room therein.

(3)(A) Any person renting, leasing, or otherwise providing real property for compensation shall not refuse to permit an individual with a disability, at that person's expense, to make reasonable modifications of the existing

---

[1] 42 U.S.C.A. § 12101 et seq.

rented premises if the modifications are necessary to afford the person full enjoyment of the premises. However, any modifications under this paragraph may be conditioned on the disabled tenant entering into an agreement to restore the interior of the premises to the condition existing prior to the modifications. No additional security may be required on account of an election to make modifications to the rented premises under this paragraph, but the lessor and tenant may negotiate, as part of the agreement to restore the premises, a provision requiring the disabled tenant to pay an amount into an escrow account, not to exceed a reasonable estimate of the cost of restoring the premises.

(B) Any person renting, leasing, or otherwise providing real property for compensation shall not refuse to make reasonable accommodations in rules, policies, practices, or services, when those accommodations may be necessary to afford individuals with a disability equal opportunity to use and enjoy the premises.

(4) Nothing in this subdivision shall require any person renting, leasing, or providing for compensation real property to modify his or her property in any way or provide a higher degree of care for an individual with a disability than for an individual who is not disabled.

(5) Except as provided in paragraph (6), nothing in this part shall require any person renting, leasing, or providing for compensation real property, if that person refuses to accept tenants who have dogs, to accept as a tenant an individual with a disability who has a dog.

(6)(A) It shall be deemed a denial of equal access to housing accommodations within the meaning of this subdivision for any person, firm, or corporation to refuse to lease or rent housing accommodations to an individual who is blind or visually impaired on the basis that the individual uses the services of a guide dog, an individual who is deaf or hearing impaired on the basis that the individual uses the services of a signal dog, or to an individual with any other disability on the basis that the individual uses the services of a service dog, or to refuse to permit such an individual who is blind or visually impaired to keep a guide dog, an individual who is deaf or hearing impaired to keep a signal dog, or an individual with any other disability to keep a service dog on the premises.

(B) Except in the normal performance of duty as a mobility or signal aid, nothing contained in this paragraph shall be construed to prevent the owner of a housing accommodation from establishing terms in a lease or rental agreement that reasonably regulate the presence of guide dogs, signal dogs, or service dogs on the premises of a housing accommodation, nor shall this paragraph be construed to relieve a tenant from any liability otherwise imposed by law for real and personal property damages caused by such a dog when proof of the same exists.

(C)(i) As used in this subdivision, "guide dog" means any guide dog that was trained by a person licensed under Chapter 9.5 (commencing with Section 7200) of Division 3 of the Business and Professions Code or as defined in the regulations implementing Title III of the Americans with Disabilities Act of 1990 (Public Law 101-336).

(ii) As used in this subdivision, "signal dog" means any dog trained to alert an individual who is deaf or hearing impaired to intruders or sounds.

(iii) As used in this subdivision, "service dog" means any dog individually trained to the requirements of the individual with a disability, including, but not limited to, minimal protection work, rescue work, pulling a wheelchair, or fetching dropped items.

(7) It shall be deemed a denial of equal access to housing accommodations within the meaning of this subdivision for any person, firm, or corporation to refuse to lease or rent housing accommodations to an individual who is blind or visually impaired, an individual who is deaf or hearing impaired, or other individual with a disability on the basis that the individual with a disability is partially or wholly dependent upon the income of his or her spouse, if the spouse is a party to the lease or rental agreement. Nothing in this subdivision, however, shall prohibit a lessor or landlord from considering the aggregate financial status of an individual with a disability and his or her spouse.

(c) Visually impaired or blind persons and persons licensed to train guide dogs for individuals who are visually impaired or blind pursuant to Chapter 9.5 (commencing with Section 7200) of Division 3 of the Business and Professions Code or guide dogs as defined in the regulations implementing Title III of the Americans with Disabilities Act of 1990 (Public Law 101-336), and persons who are deaf or hearing impaired and persons authorized to train signal dogs for individuals who are deaf or hearing impaired, and other individuals with a disability

and persons authorized to train service dogs for individuals with a disability, may take dogs, for the purpose of training them as guide dogs, signal dogs, or service dogs in any of the places specified in subdivisions (a) and (b). These persons shall ensure that the dog is on a leash and tagged as a guide dog, signal dog, or service dog by identification tag issued by the county clerk, animal control department, or other agency, as authorized by Chapter 3.5 (commencing with Section 30850) of Division 14 of the Food and Agricultural Code. In addition, the person shall be liable for any provable damage done to the premises or facilities by his or her dog.

(d) A violation of the right of an individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) also constitutes a violation of this section, and nothing in this section shall be construed to limit the access of any person in violation of that act.

(e) Nothing in this section shall preclude the requirement of the showing of a license plate or disabled placard when required by enforcement units enforcing disabled persons parking violations pursuant to Sections 22507.8 and 22511.8 of the Vehicle Code.

§ 54.2. Guide, signal or service dogs; right to accompany individuals with a disability and trainers; damages

(a) Every individual with a disability has the right to be accompanied by a guide dog, signal dog, or service dog, especially trained for the purpose, in any of the places specified in Section 54.1 without being required to pay an extra charge or security deposit for the guide dog,

signal dog, or service dog. However, the individual shall be liable for any damage done to the premises or facilities by his or her dog.

(b) Individuals who are blind or otherwise visually impaired and persons licensed to train guide dogs for individuals who are blind or visually impaired pursuant to Chapter 9.5 (commencing with Section 7200) of Division 3 of the Business and Professions Code or as defined in regulations implementing Title III of the Americans with Disabilities Act of 1990 (Public Law 101-336)[1], and individuals who are deaf or hearing impaired and persons authorized to train signal dogs for individuals who are deaf or hearing impaired, and individuals with a disability and persons who are authorized to train service dogs for the individuals with a disability may take dogs, for the purpose of training them as guide dogs, signal dogs, or service dogs in any of the places specified in Section 54.1 without being required to pay an extra charge or security deposit for the guide dog, signal dog, or service dog. However, the person shall be liable for any damage done to the premises or facilities by his or her dog. These persons shall ensure the dog is on a leash and tagged as a guide dog, signal dog, or service dog by an identification tag issued by the county clerk, animal control department, or other agency, as authorized by Chapter 3.5 (commencing with Section 30850) of Title 14 of the Food and Agricultural Code.

A violation of the right of an individual under the Americans with Disabilities Act of 1990 (Public Law

---

[1] 42 U.S.C.A. § 12101 et seq.

101-336) also constitutes a violation of this section, and nothing in this section shall be construed to limit the access of any person in violation of that act.

(c) As used in this section, the terms "guide dog," "signal dog," and "service dog" have the same meanings as specified in Section 54.1.

(d) Nothing in this section precludes the requirement of the showing of a license plate or disabled placard when required by enforcement units enforcing disabled persons parking violations pursuant to Sections 22507.8 and 22511.8 of the Vehicle Code.

§ 54.3. Violations; liability

(a) Any person or persons, firm or corporation who denies or interferes with admittance to or enjoyment of the public facilities as specified in Sections 54 and 54.1 or otherwise interferes with the rights of an individual with a disability under Sections 54, 54.1 and 54.2 is liable for each offense for the actual damages and any amount as may be determined by a jury, or the court sitting without a jury, up to a maximum of three times the amount of actual damages but in no case less than one thousand dollars ($1,000), and attorney's fees as may be determined by the court in addition thereto, suffered by any person denied any of the rights provided in Sections 54, 54.1, and 54.2. "Interfere," for purposes of this section, includes, but is not limited to, preventing or causing the prevention of a guide dog, signal dog, or service dog from carrying out its functions in assisting a disabled person.

(b) Any person who claims to be aggrieved by an alleged unlawful practice in violation of Section 54, 54.1, or 54.2 may also file a verified complaint with the Department of Fair Employment and Housing pursuant to Section 12948 of the Government Code. The remedies in this section are nonexclusive and are in addition to any other remedy provided by law, including, but not limited to, any action for injunctive or other equitable relief available to the aggrieved party or brought in the name of the people of this state or of the United States.

(c) A person may not be held liable for damages pursuant to both this section and Section 52 for the same act or failure to act.

§ 54.4. Blind or visually impaired pedestrian; failure to carry cane or use guide dog

A blind or otherwise visually impaired pedestrian shall have all of the rights and privileges conferred by law upon other persons in any of the places, accommodations, or conveyances specified in Sections 54 and 54.1, notwithstanding the fact that the person is not carrying a predominantly white cane (with or without a red tip), or using a guide dog. The failure of a blind or otherwise visually impaired person to carry such a cane or to use such a guide dog shall not constitute negligence per se.

§ 54.5. White cane safety day; proclamation

Each year, the Governor shall publicly proclaim October 15 as White Cane Safety Day. He or she shall issue a proclamation in which:

(a) Comments shall be made upon the significance of this chapter.

(b) Citizens of the state are called upon to observe the provisions of this chapter and to take precautions necessary to the safety of disabled persons.

(c) Citizens of the state are reminded of the policies with respect to disabled persons declared in this chapter and he urges the citizens to cooperate in giving effect to them.

(d) Emphasis shall be made on the need of the citizenry to be aware of the presence of disabled persons in the community and to keep safe and functional for the disabled the streets, highways, sidewalks, walkways, public buildings, public facilities, other public places, places of public accommodation, amusement and resort, and other places to which the public is invited, and to offer assistance to disabled persons upon appropriate occasions.

(e) It is the policy of this state to encourage and enable disabled persons to participate fully in the social and economic life of the state and to engage in remunerative employment.

§ 54.6. Visually impaired

As used in this part, "visually impaired" includes blindness and means having central visual acuity not to exceed 20/200 in the better eye, with corrected lenses, as measured by the Snellen test, or visual acuity greater than 20/200, but with a limitation in the field of vision

such that the widest diameter of the visual field subtendsan[1] angle is not greater than 20 degrees.

---

[1] So in chaptered copy.

§ 54.7. Zoos or wild animal parks; facilities for guide, service or signal dogs accompanying individuals with a disability

(a) Notwithstanding any other provision of law, the provisions of this part shall not be construed to require zoos or wild animal parks to allow guide dogs, signal dogs, or service dogs to accompany individuals with a disability in areas of the zoo or park where zoo or park animals are not separated from members of the public by a physical barrier. As used in this section, "physical barrier" does not include an automobile or other conveyance.

(b) Any zoo or wild animal park that does not permit guide dogs, signal dogs, or service dogs to accompany individuals with a disability therein shall maintain, free of charge, adequate kennel facilities for the use of guide dogs, signal dogs, or service dogs belonging to these persons. These facilities shall be of a character commensurate with the anticipated daily attendance of individuals with a disability. The facilities shall be in an area not accessible to the general public, shall be equipped with water and utensils for the consumption thereof, and shall otherwise be safe, clean, and comfortable.

(c) Any zoo or wild animal park that does not permit guide dogs to accompany blind or visually impaired

persons therein shall provide free transportation to blind or visually impaired persons on any mode of transportation provided for members of the public.

Each zoo or wild animal park that does not permit service dogs to accompany individuals with a disability shall provide free transportation to individuals with a disability on any mode of transportation provided for a member of the public in cases where the person uses a wheelchair and it is readily apparent that the person is unable to maintain complete or independent mobility without the aid of the service dog.

(d) Any zoo or wild animal park that does not permit guide dogs to accompany blind or otherwise visually impaired persons therein shall provide sighted escorts for blind or otherwise visually impaired persons if they are unaccompanied by a sighted person.

(e) As used in this section, "wild animal park" means any entity open to the public on a regular basis, licensed by the United States Department of Agriculture under the Animal Welfare Act as an exhibit, and operating for the primary purposes of conserving, propagating, and exhibiting wild and exotic animals, and any marine, mammal, or aquatic park open to the general public.

§ 54.8. Hearing impaired persons; assistive listening systems in civil or criminal proceedings; notice of need; availability; use in proceedings

(a) In any civil or criminal proceeding, including, but not limited to, traffic, small claims court, family court proceedings and services, and juvenile court proceedings,

in any court-ordered or court-provided alternative dispute resolution, including mediation and arbitration, or in any administrative hearing of a public agency, where a party, witness, attorney, judicial employee, judge, juror, or other participant who is hearing impaired, the individual who is hearing impaired, upon his or her request, shall be provided with a functioning assistive listening system or a computer-aided transcription system. Any individual requiring this equipment shall give advance notice of his or her need to the appropriate court or agency at the time the hearing is set or not later than five days before the hearing.

(b) Assistive listening systems include, but are not limited to, special devices which transmit amplified speech by means of audio-induction loops, radio frequency systems (AM or FM), or infrared transmission. Personal receivers, headphones, and neck loops shall be available upon request by individuals who are hearing impaired.

(c) If a computer-aided transcription system is requested, sufficient display terminals shall be provided to allow the individual who is hearing impaired to read the real time transcript of the proceeding without difficulty.

(d) A sign shall be posted in a prominent place indicating the availability of, and how to request, an assistive listening system and a computer-aided transcription system. Notice of the availability of the systems shall be posted with notice of trials.

(e) Each county shall have at least one portable assistive listening system for use by any court within the

county. The system shall be in a location jointly determined by the county board of supervisors and the judges.

(f) The Judicial Council shall develop and approve official forms for notice of the availability of assistive listening systems and computer-aided transcription systems for individuals who are hearing impaired. The Judicial Council shall also develop and maintain a system to record utilization by the courts of these assistive listening systems and computer-aided transcription systems.

(g) If the individual who is hearing impaired is a juror, the jury deliberation room shall be equipped with an assistive listening system or a computer-aided transcription system upon the request of the juror.

(h) A court reporter may be present in the jury deliberating room during a jury deliberation if the services of a court reporter for the purpose of operating a computer-aided transcription system are required for a juror who is hearing impaired.

(i) In any of the proceedings referred to in subdivision (a), or in any administrative hearing of a public agency, in which the individual who is hearing impaired is a party, witness, attorney, judicial employee, judge, juror, or other participant, and has requested use of an assistive listening system or computer-aided transcription system, the proceedings shall not commence until the system is in place and functioning.

(j) As used in this section, "individual who is hearing impaired" means an individual with a hearing loss, who, with sufficient amplification or a computer-aided

transcription system, is able to fully participate in the proceeding.

(k) In no case shall this section be construed to prescribe a lesser standard of accessibility or usability than that provided by Title II of the Americans with Disabilities Act of 1990 (Public Law 101-336)[1] and federal regulations adopted pursuant to that act.

§ 55. Violations; injunction; action by person actually or potentially aggrieved

Any person who is aggrieved or potentially aggrieved by a violation of Section 54 or 54.1 of this code, Chapter 7 (commencing with Section 4450) of Division 5 of Title 1 of the Government Code, or Part 5.5 (commencing with Section 19955) of Division 13 of the Health and Safety Code may bring an action to enjoin the violation. The prevailing party in the action shall be entitled to recover reasonable attorney's fees.

§ 55.1. Violations; injunctions; district or city attorney, attorney general

In addition to any remedies available under the federal Americans with Disabilities Act of 1990, Public Law 101-336 (42 U.S.C. Sec. 12102), or other provisions of law, the district attorney, the city attorney, the Department of Rehabilitation acting through the Attorney General, or the Attorney General may bring an action to enjoin any violation of Section 54 or 54.1.

---

[1] 42 U.S.C.A. § 12101 et seq.

CALIFORNIA GOVERNMENT CODE

§ 11135. Programs or activities funded by state; discrimination on basis of ethnic group identification, religion, age, sex, color, or disability; federal act; definition

(a) No person in the State of California shall, on the basis of ethnic group identification, religion, age, sex, color, or disability, be unlawfully denied the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is funded directly by the state or receives any financial assistance from the state.

(b) With respect to discrimination on the basis of disability, programs and activities subject to subdivision (a) shall meet the protections and prohibitions contained in Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12132), and the federal rules and regulations adopted in implementation thereof, except that if the laws of this state prescribe stronger protections and prohibitions, the programs and activities subject to subdivision (a) shall be subject to the stronger protections and prohibitions.

(c) As used in this section, "disability" means any of the following with respect to an individual: (1) a physical or mental impairment that substantially limits one or more of the major life activities of the individual, (2) a record of an impairment as described in paragraph (1), or (3) being regarded as having an impairment as described in paragraph (1).

---

§ 11136. Notice to contractor, grantee or local agency by state agency; probable cause to believe violation of statute or regulation; hearing

Whenever a state agency that administers a program or activity that is funded directly by the state or receives any financial assistance from the state, has reasonable cause to believe that a contractor, grantee, or local agency has violated the provisions of Section 11135, or any regulation adopted to implement such section, the head of the state agency shall notify the contractor, grantee, or local agency of such violation and shall, after considering all relevant evidence, determine whether there is probable cause to believe that a violation of the provisions of Section 11135, or any regulation adopted to implement such section, has occurred. In the event that it is determined that there is probable cause to believe that the provisions of Section 11135, or any regulation adopted to implement such section, have been violated, the head of the state agency shall cause to be instituted a hearing conducted pursuant to the provisions of Chapter 5 (commencing with Section 11500) of this part to determine whether a violation has occurred.

---

§ 11137. Action to curtail state funding upon determination of violation

If it is determined that a contractor, grantee, or local agency has violated the provisions of this article, the state agency that administers the program or activity involved shall take action to curtail state funding in whole or in part to such contractor, grantee, or local agency.

---

§ 11138. Rules and regulations

Each state agency that administers a program or activity that is funded directly by the state or receives any financial assistance from the state and that enters into contracts for the performance of services to be provided to the public in an aggregate amount in excess of one hundred thousand dollars ($100,000) per year shall, in accordance with the provisions of Chapter 4.5 (commencing with Section 11371) of this part, adopt such rules and regulations as are necessary to carry out the purpose and provisions of this article.

---

§ 11139. Prohibitions and sanctions; construction and enforcement of article

The prohibitions and sanctions imposed by this article are in addition to any other prohibitions and sanctions imposed by law.

This article shall not be interpreted in a manner that would frustrate its purpose.

This article shall not be interpreted in a manner that would adversely affect lawful programs which benefit the disabled, the aged, minorities, and women.

This article and regulations adopted pursuant to this article may be enforced by a civil action for equitable relief.

---

§ 12940. Employers, labor organizations, employment agencies and other persons; unlawful employment practice; exceptions

It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or sexual orientation of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.

(1) This part does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee with a physical or mental disability, where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger his or her health or safety or the health or safety of others even with reasonable accommodations.

(2) This part does not prohibit an employer from refusing to hire or discharging an employee who, because of the employee's medical condition, is unable to perform

his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations. Nothing in this part shall subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee who, because of the employee's medical condition, is unable to perform his or her essential duties, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations.

(3) Nothing in this part relating to discrimination on account of marital status shall do either of the following:

(A) Affect the right of an employer to reasonably regulate, for reasons of supervision, safety, security, or morale, the working of spouses in the same department, division, or facility, consistent with the rules and regulations adopted by the commission.

(B) Prohibit bona fide health plans from providing additional or greater benefits to employees with dependents than to those employees without or with fewer dependents.

(4) Nothing in this part relating to discrimination on account of sex shall affect the right of an employer to use veteran status as a factor in employee selection or to give special consideration to Vietnam-era veterans.

(b) For a labor organization, because of the race, religious creed, color, national origin, ancestry, physical

disability, mental disability, medical condition, marital status, sex, or sexual orientation of any person, to exclude, expel or restrict from its membership the person, or to provide only second-class or segregated membership or to discriminate against any person because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or sexual orientation of the person in the election of officers of the labor organization or in the selection of the labor organization's staff or to discriminate in any way against any of its members or against any employer or against any person employed by an employer.

(c) For any person to discriminate against any person in the selection or training of that person in any apprenticeship training program or any other training program leading to employment because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or sexual orientation of the person discriminated against.

(d) For any employer or employment agency, unless specifically acting in accordance with federal equal employment opportunity guidelines and regulations approved by the commission, to print or circulate or cause to be printed or circulated any publication, or to make any non-job-related inquiry of an employee or applicant, either verbal or through use of an application form, that expresses, directly or indirectly, any limitation, specification, or discrimination as to race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or sexual

orientation, or any intent to make any such limitation, specification or discrimination. Except as provided in the Americans with Disabilities Act of 1990 (Public Law 101-336) and the regulations adopted pursuant thereto, nothing in this subdivision shall prohibit any employer from making, in connection with prospective employment, an inquiry as to, or a request for information regarding, the physical fitness, medical condition, physical condition, or medical history of applicants if that inquiry or request for information is directly related and pertinent to the position the applicant is applying for or directly related to a determination of whether the applicant would endanger his or her health or safety or the health or safety of others.

(e) For any employer, labor organization, or employment agency to harass, discharge, expel, or otherwise discriminate against any person because the person has made a report pursuant to Section 11161.8 of the Penal Code that prohibits retaliation against hospital employees who report suspected patient abuse by health facilities or community care facilities.

(f) For any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.

(g) For any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so.

(h)(1) For an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, or a person providing services pursuant to a contract by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment.

(2) The provisions of this subdivision are declaratory of existing law, except for the new duties imposed on employers with regard to harassment.

(3)(A) For purposes of this subdivision only, "employer" means any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities. The definition of "employer" in subdivision (d) of Section 12926 applies to all provisions of this section other than this subdivision.

(B) Notwithstanding subparagraph (A), for purposes of this subdivision, "employer" does not include a

religious association or corporation not organized for private profit.

(C) For purposes of this subdivision, "harassment" because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions.

(4) For purposes of this subdivision, "a person providing services pursuant to a contract" means a person who meets all of the following criteria:

(A) The person has the right to control the performance of the contract for services and discretion as to the manner of performance.

(B) The person is customarily engaged in an independently established business.

(C) The person has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.

(i) For an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.

(j) For an employer or other entity covered by this part to refuse to hire or employ a person or to refuse to select a person for a training program leading to employment or to bar or to discharge a person from employment or from a training program leading to employment, or to discriminate against a person in compensation or in

terms, conditions, or privileges of employment because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer or other entity covered by this part demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance, including the possibilities of excusing the person from those duties that conflict with his or her religious belief or observance or permitting those duties to be performed at another time or by another person, but is unable to reasonably accommodate the religious belief or observance without undue hardship on the conduct of the business of the employer or other entity covered by this part. Religious belief or observance, as used in this section, includes, but is not limited to, observance of a Sabbath or other religious holy day or days, and reasonable time necessary for travel prior and subsequent to a religious observance.

(k) For an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in paragraph (1) or (2) of subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship to its operation.

(*l*) For an employer or other entity covered by this part, to subject, directly or indirectly, any employee, applicant, or other person to a test for the presence of a genetic characteristic.

---

§ 12955. Unlawful practices

Text of section operative until Jan. 1, 2005.

It shall be unlawful:

(a) For the owner of any housing accommodation to discriminate against or harass any person because of the race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, familial status, source of income, or disability of that person.

(b) For the owner of any housing accommodation to make or to cause to be made any written or oral inquiry concerning the race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, familial status, or disability of any person seeking to purchase, rent or lease any housing accommodation.

(c) For any person to make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a housing accommodation that indicates any preference, limitation, or discrimination based on race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, familial status, source of income, or disability or an intention to make any such preference, limitation, or discrimination.

(d) For any person subject to the provisions of Section 51 of the Civil Code, as that section applies to housing accommodations, to discriminate against any person on the basis of sex, sexual orientation, color, race, religion, ancestry, national origin, familial status, marital status, disability, source of income, or on any other basis prohibited by that section.

(e) For any person, bank, mortgage company or other financial institution that provides financial assistance for the purchase, organization, or construction of any housing accommodation to discriminate against any person or group of persons because of the race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, familial status, source of income, or disability in the terms, conditions, or privileges relating to the obtaining or use of that financial assistance.

(f) For any owner of housing accommodations to harass, evict, or otherwise discriminate against any person in the sale or rental of housing accommodations when the owner's dominant purpose is retaliation against a person who has opposed practices unlawful under this section, informed law enforcement agencies of practices believed unlawful under this section, has testified or assisted in any proceeding under this part, or has aided or encouraged a person to exercise or enjoy the rights secured by this part. Nothing herein is intended to cause or permit the delay of an unlawful detainer action.

(g) For any person to aid, abet, incite, compel, or coerce the doing of any of the acts or practices declared unlawful in this section, or to attempt to do so.

(h) For any person, for profit, to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, sexual orientation, marital status, ancestry, disability, source of income, familial status, or national origin.

(i) For any person or other organization or entity whose business involves real estate-related transactions

to discriminate against any person in making available a transaction, or in the terms and conditions of a transaction, because of race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, source of income, familial status, or disability.

(j) To deny a person access to, or membership or participation in, a multiple listing service, real estate brokerage organization, or other service because of race, color, religion, sex, sexual orientation, marital status, ancestry, disability, familial status, source of income, or national origin.

(k) To otherwise make unavailable or deny a dwelling based on discrimination because of race, color, religion, sex, sexual orientation, familial status, source of income, disability, or national origin.

(*l*) To discriminate through public or private land use practices, decisions, and authorizations because of race, color, religion, sex, sexual orientation, familial status, marital status, disability, national origin, source of income, or ancestry. Discrimination includes, but is not limited to, restrictive covenants, zoning laws, denials of use permits, and other actions authorized under the Planning and Zoning Law (Title 7 (commencing with Section 65000)), that make housing opportunities unavailable.

Discrimination under this subdivision also includes the existence of a restrictive covenant, regardless of whether accompanied by a statement that the restrictive covenant is repealed or void. This paragraph shall become operative on January 1, 2001.

(m) As used in this section, "race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, familial status, source of income, or disability" includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics.

(n) To use a financial or income standard in the rental of housing that fails to account for the aggregate income of persons residing together or proposing to reside together on the same basis as the aggregate income of married persons residing together or proposing to reside together.

(o) In instances where there is a government rent subsidy, to use a financial or income standard in assessing eligibility for the rental of housing that is not based on the portion of the rent to be paid by the tenant.

(p)(1) For the purposes of this section, "source of income" means lawful, verifiable income paid directly to a tenant or paid to a representative of a tenant.

(2) For the purposes of this section, it shall not constitute discrimination based on source of income to make a written or oral inquiry concerning the level or source of income.

(q) This section shall remain in effect only until January 1, 2005, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2005, deletes or extends that date.

CALIFORNIA VEHICLE CODE

§ 4461. Improper loan or display of documents, plates, or disabled person placards; Violations

(a) No person shall lend any certificate of ownership, registration card, license plate, special plate, validation tab, or permit issued to him or her if the person desiring to borrow it would not be entitled to its use, nor shall any person knowingly permit its use by one not entitled to it.

(b) No person to whom a disabled person placard has been issued shall lend the placard to any other person, nor shall any disabled person knowingly permit the use *for parking purposes* of the placard *or identification license plate issued pursuant to Section 5007* by one not entitled to it. A person to whom a disabled person placard has been issued may permit another person to use the placard only while in the presence or reasonable proximity of the disabled person for the purpose of transporting the disabled person. A violation of this subdivision is a misdemeanor.

(c) Except for the purpose of transporting disabled persons as specified in subdivision (b), no person shall display any disabled person placard that was not issued to him or her or that has been canceled or revoked pursuant to Section 22511.6. A violation of this subdivision is a misdemeanor.

(d) Notwithstanding subdivisions (a), (b), and (c), no person using a vehicle displaying a special identification license plate issued to another pursuant to Section 5007 shall park in those parking stalls or spaces designated for disabled persons pursuant to Section 22511.7 or

22511.8, unless transporting a disabled person. A violation of this subdivision is a misdemeanor.

(e) For the purposes of subdivisions (b) and (c), "disabled person placard" means a placard issued pursuant to Section 22511.55 or 22511.59.

---

§ 4463. Alteration or falsification of evidence of ownership, registration, or identification; Possession or sale of identification number plate

* * *

(d) No person shall lend any disabled person placard issued to him or her, nor shall any person knowingly permit its use by one not entitled to it. A disabled person placard holder may permit another person to use the placard for the purpose of transporting the disabled person for whom the placard was issued. A violation of this subdivision is a misdemeanor.

(e) For purposes of subdivision (b), (c), or (d), "disabled person placard" means a placard issued pursuant to Section *22511.55 or 22511.59.*

---

§ 5007. Special identification plates for disabled persons; Application procedure; Return of plates

(a) The department shall, upon application and without additional fees, issue a special identification license plate or plates to a disabled person or disabled veteran, pursuant to procedures adopted by the department.

(b) The special identification plates issued to a disabled person or disabled veteran shall run in a regular numerical series which shall include one or more unique two-letter codes reserved for disabled person license plates or disabled veteran license plates. The International Symbol of Access adopted pursuant to Section 3 of Public Law 100-641 commonly known as the "wheelchair symbol" shall be depicted on each plate.

(c) Prior to issuing any disabled person or disabled veteran a special identification license plate, the department may require the applicant to submit a certificate signed by the physician or surgeon substantiating the disability. The disability of any person who has lost, or has lost use of, one or more lower extremities or both hands, or who has significant limitation in the use of lower extremities, may also be certified by a licensed chiropractor. The blindness of any applicant shall be certified by a licensed physician or surgeon who specializes in diseases of the eye or a licensed optometrist.

(d) The special identification license plate shall, upon the death of the disabled person or disabled veteran, be returned to the department within 60 days or upon the expiration of the vehicle registration, whichever occurs first.

ARTICLE 2

Registration Fees

§ 9250. Fee requirement

(a) A registration fee of twenty-eight dollars ($28) shall be paid to the department for the registration of every vehicle or trailer coach of a type subject to registration under this code, except those vehicles that are expressly exempted under this code from the payment of registration fees.

(b) The registration fee imposed under this section applies to all vehicles described in Section 5004, whether or not special identification plates are issued to that vehicle.

* * *

---

§ 22507.8. Parking in spaces designated for disabled person prohibited

(a) It is unlawful for any person to park or leave standing any vehicle in a stall or space designated for disabled persons and disabled veterans pursuant to Section 22511.7 or 22511.8, unless the vehicle displays either a special identification license plate issued pursuant to Section 5007 or a distinguishing placard issued pursuant to Section 22511.55 or 22511.59.

(b) It is unlawful for any person to obstruct, block, or otherwise bar access to those parking stalls or spaces except as provided in subdivision (a).

(c) It is unlawful for any person to park or leave standing any vehicle, including a vehicle displaying a special identification license plate issued pursuant to Section 5007 or a distinguishing placard issued pursuant to Section 22511.55 or 22511.59, in either of the following places:

(1) On the lines marking the boundaries of a parking stall or space designated for disabled persons or disabled veterans.

(2) In any area of the pavement ***adjacent to a parking stall or space designated for disabled persons or disabled veterans*** that is marked by crosshatched lines and is thereby designated, ***pursuant to any local ordinance,*** for the loading and unloading of vehicles ***parked in the stall or space.***

(d) Subdivisions (a), (b), and (c) apply to all offstreet parking facilities owned or operated by the state, and to all offstreet parking facilities owned or operated by a local authority. Subdivisions (a), (b), and (c) also apply to any privately owned and maintained offstreet parking facility.

---

§ 22507.9. Establishment of special units to enforce handicapped parking laws

Local authorities may establish a special enforcement unit for the sole purpose of providing adequate enforcement of Section 22507.8 and local ordinances and resolutions adopted pursuant to Section 22511.7.

Local authorities may establish recruitment and employment guidelines *that* encourage and enable employment of qualified disabled persons in these special enforcement units.

Members of the special enforcement unit may issue notices of parking violation for violations of Section 22507.8 and local ordinances adopted pursuant to Section 22511.7. Members of the special enforcement unit shall not be peace officers and shall not make arrests in the course of their official duties, but shall wear distinctive uniforms and badges while on duty. A two-way radio unit, which may utilize police frequencies or citizens' band, may be issued by the local authority to each member of the special enforcement unit for use while on duty. The local authority may pay the cost of uniforms and badges for the special enforcement unit, and may provide daily cleaning of the uniforms. Additionally, the local authority may provide motorized wheelchairs for use by members of the special unit while on duty, including batteries and necessary recharging thereof. Any motorized wheelchair used by a member of the special enforcement unit while on duty shall be equipped with a single headlamp in the front and a single stoplamp in the rear.

Members of the special enforcement unit may be paid an hourly wage without the compensatory benefits provided other permanent and temporary employees, but shall be entitled to applicable workers' compensation benefits as provided by law. Insurance provided by the local authority for disability or liability of a member of the special enforcement unit shall be the same as for other employees performing similar duties.

Nothing in this section precludes a local authority from using regular full-time employees to enforce this chapter and ordinances adopted pursuant thereto.

This section applies to all counties and cities, including every charter city and city and county.

---

§ 22511.5. Parking privileges for disabled persons and disabled veterans

(a)(1) Any disabled person or disabled veteran displaying special identification license plates issued under Section 5007 or a ***distinguishing*** placard issued under Section 22511.55 ***or*** 22511.59 shall be allowed to park for unlimited periods in any of the following zones:

(A) In any restricted zone described in ***paragraph (5) of subdivision (a)*** of Section 21458 or on streets upon which preferential parking privileges and height limits have been given pursuant to Section 22507.

(B) In any parking zone that is restricted as to the length of time parking is permitted as indicated by a sign erected pursuant to a local ordinance.

(2) Any disabled person or disabled veteran shall be allowed to park in any metered parking space without being required to pay any parking meter fees.

(3) This subdivision does not apply to any zone for which state law or ordinance absolutely prohibits stopping, parking, or standing of all vehicles, or which the law or ordinance reserves for special types of vehicles, or to the parking of any vehicle that is involved in the operation of a street vending business.

(b) Any disabled person or disabled veteran shall be allowed to park a vehicle displaying a special identification disabled person license plate or placard issued by a foreign jurisdiction with the same parking privileges authorized in this code for any vehicle displaying a special identification license plate or ***a distinguishing*** placard issued by the Department of Motor Vehicles.

---

§22511.7. Designation of parking for disabled persons and veterans

In addition to Section 22511.8 for offstreet parking, a local authority may, by ordinance or resolution, designate parking spaces for the exclusive use of any vehicle which displays either a ***special identification license plate issued pursuant to Section 5007 or a*** distinguishing placard issued pursuant to Section ***22511.55 or 22511.59***. Whenever a local authority so designates a parking space, it shall be indicated by blue paint on the curb or edge of the paved portion of the street adjacent to the space. In addition to blue paint, the space shall also be indicated by signs or other suitable means. In areas where snow or ice may obscure the blue paint, a clearly visible sign appropriately designating the space is sufficient for purposes of this section.

This section does not restrict the privilege granted to disabled persons and disabled veterans by Section 22511.5.

---

§ 22511.8. Removal of unauthorized vehicles from disabled person's designated parking areas

(a) Any local authority, by ordinance or resolution, and any person in lawful possession of an offstreet parking facility may designate stalls or spaces in an offstreet parking facility owned or operated by the local authority or person for the exclusive use of any vehicle which displays either a ***special identification license plate issued pursuant to Section 5007 or a*** distinguishing placard issued pursuant to Section ***22511.55 or 22511.59.*** The designation shall be made by posting a sign as described in paragraph (1), and by either of the markings described in paragraph (2) or (3):

(1) By posting immediately adjacent to, and visible from, each stall or space, a sign consisting of a profile view of a wheelchair with occupant in white on a blue background.

(2) By outlining or painting the stall or space in blue and outlining on the ground in the stall or space in white or suitable contrasting color a profile view depicting a wheelchair with occupant.

(3) By outlining a profile view of a wheelchair with occupant in white on a blue background, of the same dimensions as in paragraph (2). The profile view shall be located so that it is visible to a traffic enforcement officer when a vehicle is properly parked in the space.

* * *

§ 22511.10. Legislative findings and declarations

The Legislature hereby finds and declares all of the following:

(a) Two and one-half million Californians suffer from some form of chronic obstructive pulmonary disease. Those persons who are not in wheelchairs have difficulty walking long distances.

(b) Encouraging those with physical disabilities to engage in activities outside of the home promotes better health and self-esteem, thereby lowering health costs.

(c) Placing disabled person parking spaces closest to the main entrances of buildings does not cost taxpayers, but provides accessibility to the physically disabled.

(d) It is the intent of the Legislature, in enacting Section 22511.11, to direct the Office of the State Architect to propose regulations that require disabled person parking spaces to be located on the shortest accessible route of travel to an accessible entrance or exit of a building or parking facility.

---

§ 22511.11. Regulations for location of disabled person offstreet parking spaces

(a) The Office of the State Architect shall propose regulations specifying the location of disabled person parking stalls or spaces designated pursuant to Section 22511.8, for parking facilities constructed or reconstructed pursuant to a building permit issued on or after October 1,

1993. In specifying the placement of those stalls or spaces near buildings or facilities and within parking structures, consideration shall be given to the special access needs of disabled persons.

(b) The Office of the State Architect shall submit the regulations proposed pursuant to subdivision (a) to the State Building Standards Commission on or before July 1, 1993, for approval, adoption, and publication in Title 24 of the California Code of Regulations.

---

§ 22511.55. Application for issuance of distinguishing placard

(a)(1) Any disabled person or disabled veteran may apply to the department for the issuance of a distinguishing placard. The placard may be used in lieu of the special identification license plate or plates issued under Section 5007 for parking purposes described in Section 22511.5 when suspended from the rear view mirror or, if there is no rear view mirror, when displayed on the dashboard of a vehicle. It is the intent of the Legislature to encourage the use of these distinguishing placards because they provide law enforcement officers with a more readily recognizable symbol for distinguishing vehicles qualified for the parking privilege. The placard shall be the size and color determined by the department, shall bear the International Symbol of Access adopted pursuant to Section 3 of Public Law 100-641, commonly known as the "wheelchair symbol." The department shall

incorporate instructions for the lawful use of a placard, and a summary of the penalties for the unlawful use of a placard, into the identification card issued to the placard owner.

(2)(A) The department may establish procedures for the issuance and renewal of the placards. The placards shall have a fixed expiration date of June 30 every two years. Whenever any application for a placard is submitted to the department on or after January 1 of the year of expiration, the fee shall be for the current and subsequent renewal period.

(B) As used in this section, "year" means the period between the inclusive dates of July 1 through June 30.

(C) Prior to the end of each year, the department shall, for the most current three years available, compare its record of disability placards issued against the records of the Bureau of Vital Statistics of the State Department of Health Services, or its successor, and withhold any renewal notices that otherwise would have been sent, for any placard holders identified as deceased.

(3) The fee for an original application or renewal application is six dollars ($6).

(4) Except as provided in paragraph (5), no person is eligible for more than one placard at any time.

(5) Organizations and agencies involved in the transportation of disabled persons or disabled veterans may apply for a placard for each vehicle used for the purpose of transporting disabled persons or disabled veterans.

(b) Prior to issuing any disabled person or disabled veteran ***an original*** distinguishing placard, the department ***shall*** require the applicant to submit a certificate signed by the physician or surgeon substantiating the disability, ***unless the applicant's disability is readily observable and uncontested.*** The disability of any person who has lost, or has lost use of, one or more lower extremities or both hands, or who has significant limitation in the use of lower extremities, may also be certified by a licensed chiropractor. The blindness of any applicant shall be certified by a licensed physician or surgeon who specializes in diseases of the eye or a licensed optometrist. ***The physician or person certifying the qualifying disability shall provide a full description of the illness or disability on the form submitted to the department.***

The department shall maintain in its records all information on an applicant's certification of permanent disability and shall make such information available to eligible law enforcement or parking control agencies upon a request pursuant to Section 22511.58.

(c)(1) Any person who has been issued a distinguishing placard pursuant to subdivision (a) may apply to the department for a substitute placard without recertification of eligibility, if that placard has been lost or stolen.

(2) The fee for a substitute placard issued pursuant to paragraph (1) is six dollars ($6).

(d) The distinguishing placard shall be returned to the department not later than 60 days after the death of the disabled person or disabled veteran to whom ***the*** placard was issued.

---

§ 22511.56. Presentation of identification and evidence of issuance of placard to peace officer upon request

Any person using a distinguishing placard issued pursuant to Section *22511.55 or 22511.59* for parking as permitted by *Section 22511.5* shall, upon request of any peace officer or person authorized to enforce parking laws, ordinances, or regulations, present identification and evidence of the issuance of that placard to that person.

(b) Failure to present the requested identification and evidence of the issuance of that placard shall be a rebuttable presumption that the placard is being misused and that the associated vehicle has been parked in violation of the provisions of Section *22507.8.*

(c) In addition to any other applicable penalty for the misuse of a placard, the officer or parking enforcement person may confiscate a placard being used for parking purposes that benefit any person other than the person to whom the placard was issued by the Department of Motor Vehicles. A placard lawfully used by a person transporting a disabled person pursuant to subdivision (b) of Section 4461 shall not be confiscated.

22511.57. Restricting parking or standing of vehicles displaying lost or stolen placards

Local authorities may, by ordinance or resolution, prohibit or restrict the parking or standing of a vehicle on streets or highways or from a disabled person's parking stall or space of a privately or publicly owned or operated offstreet parking facility within their jurisdiction

when the vehicle displays, in order to obtain special parking privileges, a disabled placard issued pursuant to Section 22511.55, and the Department of Motor Vehicles record for the identification number assigned to the placard indicates that the card has been reported as lost or stolen, or was issued to a person who has been reported as being deceased for a period exceeding 60 days.

---

§ 42001.5. Punishment for infractions involving disabled person's parking space or sidewalk access ramp

Every person convicted of an infraction for a violation of subdivision (i) or (*l*) of Section 22500, Section 22507.8, or Section 22522, shall be punished by a fine of not less than two hundred fifty dollars ($250). No part of any fine imposed shall be suspended, except the court may suspend ***that portion of the fine above one hundred dollars ($100) for a violation of subdivision (i) or (l)*** of Section 22500 or of Section 22522, and the court may suspend the imposition of the fine for a conviction for a violation of Section 22507.8 if the person convicted possessed at the time of the offense, but failed to display, a valid distinguishing license plate or placard issued pursuant to Section 22511.5, ***a valid special identification license plate issued pursuant to Section 5007, or a distinguishing placard issued pursuant to Section 22511.55 or 22511.59***. The fine may be paid in installments if the court determines that the defendant is unable to pay the entire amount in one payment.

DAVIS WRIGHT TREMAINE LLP
1000 WILSHIRE BOULEVARD
SUITE 600
LOS ANGELES, CALIFORNIA 90017-2463
TELEPHONE (213) 633-6800
FAX (213) 633-6899

Andrew R. Hall (CA SBN 125773)
Elizabeth Staggs-Wilson (CA SBN 183160)

OF COUNSEL:
PETERSON & MYERS, P.A.
J. Davis Connor (FL SBN 0714313)
Stephen R. Senn (FL SBN 0833878)
P.O. Box 24628
Lakeland, FL 33802
(941) 683-6511

ANTONELLO & FEGERS, P.A.
Robert Antonello (FL SBN 0259977)
P.O. Box 7692
Winter Haven, FL 33883
(941) 294-2898

Attorneys for Plaintiffs
WILLIAM ROBERT DARE and GARY PETILLO

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WILLIAM ROBERT DARE and GARY PETILLO, Plaintiffs, vs. STATE OF CALIFORNIA, DEPARTMENT OF MOTOR VEHICLES, Defendant.	Case No. CV-96-5569 JSL (ANx) **NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT** [Attached Memorandum of Points and Authorities; Declaration of Andrew R. Hall and Exhibits; Appendix of Authorities; Separate Statement of Undisputed Facts and Conclusions of Law; and [Proposed] Judgment Filed Concurrently] Date: May 12, 1997 Time: 1:00 p.m. Place: 312 N. Spring St., Courtroom 4

MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs William Robert Dare and Gary Petillo, on behalf of themselves and members of classes certified by this Court on January 21, 1997 ("Plaintiff Classes"),[1]

---

[1] This Court certified the following to classes (the "Plaintiff Classes") pursuant to F.R.C.P. Rule 23(b) (2):

1. All purchasers of distinguishing placards pursuant to California Vehicle Code § 22511.55 since January 26, 1992, and all persons who will in the future be required to pay money for such placards until and unless

hereby move, by and through their undersigned attorneys of record and pursuant to Fed. R. Civ. P. 56, for entry of partial summary judgment in favor of the Plaintiff Classes and against the State of California Department of Motor Vehicles ("State") on the First Claim for Relief for Declaratory and Injunctive Relief (Count I) in the Complaint in the instant action:

1) Declaring that it is unlawful under the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101, *et seq.* ("ADA"), as implemented by Justice Department regulations promulgated at 28 C.F.R. § 35.130(f), to require payment for placards that permit the use of parking places reserved for persons with disabilities;

---

declaratory and injunctive relief protects against the requirement of payment as a condition of access to parking accommodations reserved for persons with disabilities.

2. All purchasers of distinguishing placards pursuant to California Vehicle Code § 22511.55 since January 26, 1992, who are disabled under the Americans with Disabilities Act, and all persons who will in the future be required to pay money for such placards, who are disabled under the Americans with Disabilities Act, until and unless declaratory and injunctive relief protects against the requirement of payment as a condition of access to parking accommodations reserved for persons with disabilities.

Order Denying Defendants' Motion To Dismiss And Granting Plaintiff's Motion For Class Certification (Filed Jan. 31, 1997; Entered February 4, 1997) ("Dismissal and Certification Order").

2) Enjoining the State from requiring payment from future applicants for placards that permit the use of parking places reserved for people with disabilities;

3) Enjoining the State to provide (within the next 60 days) notice to the Plaintiff Classes and others eligible to receive Placards that there will no longer be a fee for Placards;

4) Reserving jurisdiction to determine and award attorneys' fees and to resolve the issues presented in Count II of the Complaint.

and

In support of this motion, the Plaintiff Classes state that the following points are either established as a matter of law, or that there is no dispute as to the following points which are matters of fact, and that from these points of fact and law the Plaintiffs are entitled to judgment of liability in their favor as a matter of law:

1. The laws of the State of California have provided and continue to provide for the issuance of parking placards for persons who suffer disabilities which severely limit their mobility ("Placards"). The criteria applied to determine whether the limitations on mobility are sufficient to warrant issuance of a Placard are codified in the California Vehicle Code ("CVC").

2. Placards allow the holder to park in specially designated parking spaces set aside for the exclusive use of persons with disabilities. Placards are also available to organizations or individuals upon a suitable showing that the person or organization provides transportation to persons with disabilities.

3. By statute, Placards may be renewed every two years or will otherwise expire.

4. In order to receive a Placard, persons with disabilities sufficiently severe as to satisfy the State's criteria are also required to pay a fee ("Placard Fee"). An additional Fee must be paid for each additional Placard, for each renewal of a Placard, and upon the replacement of any Placard which is lost or stolen.

5. Since they became effective on January 26, 1992, applicable provisions of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101, et seq. ("ADA"), including regulations developed and promulgated by the United States Department of Justice ("DOJ") under authority of the ADA have mandated the creation or maintenance of special parking considerations for persons with disabilities, so as to allow reasonably equivalent access to public and private facilities. The reservation of designated parking spaces located close to the entrance of private and public buildings, facilities, or accommodations (which often must be fitted with ramps), is essential to allow persons with disabilities equal access to public and private buildings and facilities.

6. The requirement that designated parking spaces be set aside for persons with disabilities, and other requirements of the ADA designed to enrich the lives of persons with disabilities by protecting them from discrimination and from various barriers to participation in society, were imposed on State and local governments and on private entities based upon specific findings of the United States Congress. 42 U.S.C. § 12101(a).

7. The charges which have been exacted from Californians with disabilities for Placards, and which the Department continues to exact for these Placards, are in violation of the ADA and its regulations. The ADA mandates that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefit of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

8. Particularly pertinent to the issue raised in this litigation is the following regulation developed and promulgated by the DOJ:

> A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act of this part.

28 C.F.R. § 35.130(f) (1994). This regulation carries the force of law and the State is obligated to comply with the requirements of this regulation.

9. Creation and maintenance of special parking accommodations set aside for persons with disabilities is required of both public and private entities by the ADA and its regulations. *See generally* 28 C.F.R. § 36.304 (1994): *ADA Accessibility Guidelines for Buildings and Facilities*, located at Appendix A to 28 C.F.R. ch. I pt. 36 (1994).

10. Because special parking accommodations for persons with disabilities are guaranteed under the ADA,

the State may not impose a surcharge (the Placard Fee) for the enjoyment of the right to access such accommodations.

11. While the State issues special access license plates at no extra charge which allow use of disabled parking accommodations, such plates do not provide the fullest measure of access by reasonable measures as plates are not portable.

12. In the course of discovery in this case, the State has disclosed that millions of Placards have been sold since the ADA became effective in January 1992. Thus, the State has illegally collected millions of dollars since the effective date of Title II of the ADA.

13. As evidenced by their pleadings in this case, the State intends to continue to require payment of the Placard Fee as a precondition for persons with disabilities to use the parking places reserved for the exclusive use of persons with disabilities unless and until this Court declares the Placard Fee to be unlawful and enjoins the State from continuing to impose that surcharge.

14. As evidenced by the pleadings, the dispute between the parties is essentially an issue of law: May the Department impose the Placard Fee as a precondition to access to parking places reserved for persons with disabilities, or is such a Fee prohibited under the ADA and its regulations?

15. The record before the Court allows this Court to determine as a matter of law that the State's Placard Fee violates the ADA based on the points and authorities set

forth in the attached Memorandum of Points and Authorities and the concurrently filed Separate Statement of Facts and Law, the supporting Appendix and Declaration of Andrew R. Hall, as well as the pleadings and documents maintained in the Court's file in this action and the further pleadings and argument to be presented to the Court through conduct of the hearing of this Motion.

DATED: April 4, 1997

Of Counsel:
PETERSON & MYERS, P.A.
J. Davis Connor
Florida Bar No. 0714313
Stephen R. Senn
Florida Bar No. 0833878
Post Office Box 24628
Lakeland, Florida 33802-4628
(941) 683-6511
Attorneys for Plaintiffs

ANTONELLO & FEGERS
Robert Joseph Antonello
Florida Bar No. 259977
Post Office Box 7692
Winter Haven, Florida 33883
(941) 294-2898
Attorneys for Plaintiffs

DAVIS WRIGHT TREMAINE LLP
By: /s/ Andrew R. Hall
Andrew R. Hall

California SBN 125773
Elizabeth Staggs-Wilson
California SBN 183160
1000 Wilshire Boulevard, Suite 600
Los Angeles, California 90017-2463
(213) 633-6800
Attorney for Plaintiffs

Supreme Court, U.S.
FILED
APR 25 2000
CLERK

(2)

No. 99-1417

In The

Supreme Court of the United States

STATE OF CALIFORNIA,
DEPARTMENT OF MOTOR VEHICLES,

Petitioner,

v.

WILLIAM ROBERT DARE AND GARY PETILLO,
INDIVIDUALLY AND ON BEHALF
OF OTHERS SIMILARLY SITUATED,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

RESPONDENTS' BRIEF IN OPPOSITION

ROBERT ANTONELLO
Florida Bar No. 0259977
ROBERT G. FEGERS
Florida Bar No. 379719
Attorneys for Respondents
ANTONELLO FEGERS & CEA
P.O. Box 7692
Winter Haven, FL 33883
(863) 294-2898 Phone

ANDREW R. HALL*
State Bar No. 125773
ELIZABETH STAGGS-WILSON
State Bar No. 183160
Attorneys for Respondents
DAVIS WRIGHT TREMAINE LLP
865 S. Figueroa Street,
Suite 2400
Los Angeles, CA 90017
(213) 633-6800 Phone
(213) 633-6899 Fax

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

35 pp

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 2

A. Petitioner Has Not Stated Grounds For Review... 3

1. The Petition Will Not Complement *Alsbrook*... 3

2. The Disincentive Claim Is Unsupported 4

3. The Manageability Contention Is Unsupported 4

4. Any Circuit Conflict Should Percolate 5

B. The Petition Does Not Raise Sufficiently Important Questions 5

1. Most States Do Not Impose Any Fee On Access 6

2. The Nonconstitutional Issues Presented Here Are Not In Dispute Among The Courts 7

C. Controversy Regarding The Applicability Of Brown's Fourteenth Amendment Analysis Is Not Sufficiently Mature 8

1. The Issue Is Novel 9

2. The Issue Is Complex..... 9

a. The *Brown* Court's Approach Is Inconsistent With Precedent 10

b. The *Brown* Approach Will Multiply Litigation By Destroying The Precedential Value Of Decisions Upholding Or Rejecting The Constitutionality Of Congressional Abrogations 12

TABLE OF CONTENTS – Continued

Page

c. Narrow Focus Is Not Required By Rules Of Constitutional Construction 13

D. Only Injunctive Relief Has Been Entered..... 15

E. Ninth Circuit's Rulings Are Correct..... 15

1. Congress May Prohibit Fees On Access..... 15

a. The Fee Prohibition Serves The Purposes Of Section 5..... 16

b. Placard Fees Are Facially Discriminatory.. 17

2. *Dare* Is Consistent With *Kimel*..... 18

3. Accessible Parking Is An ADA Mandate.... 21

4. USPPD Does Not Allow Placard Fee 22

a. USPPD Does Not Authorize Placard Fee.. 22

b. ADA Overrides USPPD 24

i. ADA Preempts Less Protective Laws 24

ii. Broad Goals Of The ADA Require Revocation Of Fees On Access.... 25

iii. ADA Controls Over Pre-ADA Laws..... 26

iv. Advisory Committee Had No Authority To Interpret The ADA... 27

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Adams Fruit Co. v. Barrett, 494 U.S. 638 (1990) 27

Alsbrook v. City of Maumelle (8th Cir. 1999), *cert. granted sub nom. Alsbrook v. Arkansas*, 120 S. Ct. 1003 (January 25), *petition dismissed per stipulation*, 120 S. Ct. 1265 (March 1, 2000) 3, 12

Brown v. North Carolina Div. of Motor Vehicles, 166 F.3d 698 (4th Cir. 1999) ..... *passim*

Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995) 26

City of Boerne v. Flores, 521 U.S. 507 (1997) 2, 10, 11

Clark v. California, 123 F.3d 1267 (9th Cir. 1997)..... 12

Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) 10, 11, 18

Clinton v. City of New York, 524 U.S. 417 (1998)..... 11

Coolbaugh v. Louisiana, 136 F.3d 430 (5th Cir. 1998), *cert. denied*, 525 U.S. 819 (1998) 12

Danfelt v. Board of County Commissioners, 998 F. Supp. 606 (D. Md. 1998) 24

Dare v. State of California, 191 F.3d 1167 (9th Cir. 1999)..... *passim*

Devlin v. Arizona Youth Soccer Ass'n, 1996 U.S. Dist. LEXIS 12368 (D. Ariz. 1996) 24

Duprey v. Connecticut, 28 F. Supp. 2d 702 (D. Conn. 1998).....6, 8, 22, 23

Ellenwood v. Exxon Shipping Co., 984 F.2d 1270 (1st Cir. 1993) 24

TABLE OF AUTHORITIES – Continued

Page

Erickson v. Board of Governors, 2000 U.S. App. LEXIS 5074 (7th Cir. March 27, 2000) 12

Ex parte Young, 209 U.S. 123 (1908)..... 15

Heather K. v. City of Mallard, Iowa, 887 F. Supp. 1249 (N.D. Iowa 1995).....20, 25

Helen L. v. Didario, 46 F.3d 325 (3d Cir. 1995), *cert. denied*, 516 U.S. 813 (1995)..... 25

Keef v. State of Nebraska, Dep't of Motor Vehicles, Docket 677 Page 536 (Dist. Ct. Lancaster Cty., Nebraska)..... 8

Kimel v. Florida Bd. of Regents, 139 F.3d 1426 (11th Cir. 1998), *vacated in part on other grounds*, 120 S. Ct. 631 (2000) 12, 18, 19, 20

Little Rock Sch. Dist. v. Mauney, 183 F.3d 816 (8th Cir. 1999) 21

M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)..... 16

Martin v. Kansas, 170 F.3d 1305 (10th Cir. 1999)...12, 25

Maryland v. Baltimore Radio Show, 331 U.S. 912 (1950)..... 9

McGarry v. Missouri Dep't of Revenue, 7 F. Supp. 2d 1022 (W.D. Mo. 1998), *vacated on other grounds*, (W.D. Mo. Jan. 31, 2000).....8, 22, 23, 24, 26

Miller v. North Dakota Dep't of Transp., No. 96-C-1988 (Dist. N.D. 1997)..... 8

Morton v. Mancari, 417 U.S. 535 (1974) 26

Muller v. Costello, 187 F.3d 298 (2d Cir. 1999)..... 12

TABLE OF AUTHORITIES – Continued

Page

Murdock v. Pennsylvania, 319 U.S. 105 (1943)..... 16

Navarro Sav. Ass'n v. Lee, 446 U.S. 458 (1980)..... 13

Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, 506 U.S. 139 (1993)..... 13

Pulley v. Bowen, 817 F.2d 453 (7th Cir. 1987)..... 22

Singleton v. Commissioner, 439 U.S. 940 (1978)..... 9

Thompson v. Colorado, 29 F. Supp. 2d 1226 (D. Colo. 1998).....6, 8, 22, 23

Thrope v. Ohio, 19 F. Supp. 2d 816 (S.D. Ohio 1998)..... 6, 8, 26

University of Alabama at Birmingham Board of Trustees v. Garrett, No. 99-1240, *on review from* 193 F.3d 1214 (11th Cir. 1999)..... 5

FEDERAL STATUTES

29 U.S.C. § 621..... 18

29 U.S.C. § 794..... 19

42 U.S.C. § 12101..... 1

42 U.S.C. § 12101(a) 20, 25

42 U.S.C. § 12101(a)(2).....19, 26

42 U.S.C. § 12101(a)(5)..... 26

42 U.S.C. § 12101(a)(6).....16, 26

42 U.S.C. § 12101(a)(7)..... 26

42 U.S.C. § 12101(a)(9)..... 26

42 U.S.C. § 12132..... 1

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 12134 27

42 U.S.C. § 12201(b) 24

42 U.S.C. § 12202 5

Public Law 100-641 23

Public Law 100-641 § 3(a)(1) 23

SUPREME COURT RULES

Supreme Court Rule 10 ..... 3, 5

Supreme Court Rule 14(1)(h) 3

Supreme Court Rule 14(4) 3

FEDERAL REGULATIONS

23 C.F.R. § 1235 22

23 C.F.R. § 1235.1 23

28 C.F.R. § 35.130(b)(4) 21

28 C.F.R. § 35.130(f) 1, 5, 16, 25

28 C.F.R. § 35.149 21

28 C.F.R. § 35.15(c) 21

28 C.F.R. § 35.150 21

28 C.F.R. Ch. I pt. 36, App. A., § 4.1.2 21

28 C.F.R. Ch. I pt. 36, App. A., § 4.3 21

28 C.F.R. Ch. I pt. 36, App. A., § 4.6 21

TABLE OF AUTHORITIES – Continued

Page

STATE STATUTES

California Vehicle Code § 2211.55(a) 1

OTHER AUTHORITIES

Burgdorf, Robert Jr., *The Americans With Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 Harv. C.R.-C.L. L. Rev. 413 (1991)..... 20

Colker, Ruth, *The Section Five Quagmire*, 47 UCLA L. Rev. 653 (2000) 19

Dole, Sen. Bob, *Are We Keeping America's Promises to People With Disabilities – Commentary on Blanck*, 79 Iowa L. Rev. 925 (1994) 16, 26

The Americans with Disabilities Act Title II Technical Assistance Manual, II-3.5400 (Nov. 1993) 26

Weicker, Lowell P., Jr., *Historical Background of the Americans With Disabilities Act*, 64 Temp. L. Rev. 387 (1991)..... 21

STATEMENT OF THE CASE

Respondents William Robert Dare and Gary Petillo, individually and on behalf of others similarly situated ("Respondents"), filed suit in the United States District Court for the Central District of California in challenge to the requirement of the State of California Department of Motor Vehicles ("Petitioner") that a fee be paid for placards allowing use of accessible parking accommodations for persons with disabilities. *See* Cal. Veh. Code § 2211.55(a). Respondents alleged that this fee constitutes discrimination against persons with disabilities prohibited by the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101, et seq. ("ADA") (*see especially* 42 U.S.C. § 12132), and violates the ADA regulation codified at 28 C.F.R. § 35.130(f), which specifically prohibits public entities from imposing any surcharge on individuals with disabilities to cover the costs of measures necessary to provide the nondiscriminatory treatment required by the ADA.

The parties each moved for summary judgment on the claim for declaratory and injunctive relief. There was no dispute that Respondents were persons with disabilities under the ADA or that fees had been charged for placards allowing use of accessible parking. By its Order dated May 30, 1997, the District Court granted summary judgment in favor of Respondents, and issued an injunction prohibiting Petitioner from collecting the placard fee. The claim for reimbursement of fees unlawfully taken was not reached, and remains pending in the district court. On appeal from the injunction, Petitioner raises a host of challenges that were each rejected in *Dare v. State*

of California, 191 F.3d 1167 (9th Cir. 1999). Petitioner now seeks review of the Ninth Circuit's decision.

REASONS FOR DENYING THE WRIT

The burden is on the Petitioner to demonstrate that certiorari is appropriate, but the arguments raised by Petitioner fail to satisfy this burden. Petitioner poses three narrowly focused questions. The first question is whether Congress validly abrogated state immunity from federal challenge to fees imposed by states to pay for the cost of providing the access required by the ADA. Because few states currently impose such fees, certiorari review of the Ninth Circuit's ruling prohibiting such fees is not warranted. Questions 2 and 3 challenge the Ninth Circuit's conclusion on the merits that the ADA prohibits fees on placards allowing use of accessible parking, but the Ninth Circuit's decision in this regard is in accord with the conclusion of every other court to have reached this question and there is no circuit or district court conflict that might be resolved if these questions were addressed.

Permeating the petition is an additional question, not expressly framed, to wit, whether Eleventh Amendment abrogation questions should be analyzed under a broad focus, examining the federal enactment as a whole (as in *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997)), or a narrow focus, examining only a particular aspect of the challenged federal law (as in *Brown v. North Carolina Div.*

of Motor Vehicles, 166 F.3d 698 (4th Cir. 1999)). This controversy is, however, limited to the Fourth and Ninth Circuits, and is insufficiently mature to be reached at this time.

Finally, denial is also appropriate because the only remedy that has been obtained in this case is injunctive relief, which may be obtained in federal court regardless of resolution of any Eleventh Amendment challenge.

A. Petitioner Has Not Stated Grounds For Review

A petition for writ of certiorari will be granted only for compelling reasons. *See* Supreme Court Rule 10. These reasons are to be directly-and concisely argued in the petition. Sup. Ct. R. 14(1)(h). Failure to state the reasons for review "with accuracy, brevity, and clarity . . . is sufficient reason for the Court to deny a petition." Sup. Ct. R. 14(4).

Petitioner's petition is comprised almost entirely of argument on the merits. Very little is directed toward showing compelling reasons for this Court to resolve the three questions expressly presented.

1. The Petition Will Not Complement *Alsbrook*

Petitioner contends (Pet. 5-6) this case will provide a helpful complement to review of *Alsbrook v. City of Maumelle* (8th Cir. 1999), *cert. granted sub nom. Alsbrook v. Arkansas*, 120 S. Ct. 1003 (January 25, 2000). This argument no longer applies given the dismissal of the petition. *Alsbrook v. Arkansas*, 120 S. Ct. 1265 (March 1, 2000),

petition dismissed per stipulation. Nor will this case complement review of *Garrett*, due to the limited constitutional issue presented here by Petitioner in reliance on *Brown*.

2. The Disincentive Claim Is Unsupported

Petitioner argues (Pet. 6-7) that the Ninth Circuit's decision creates a disincentive to states that seek to implement programs on behalf of persons with disabilities that exceed the requirements of the ADA. There is nothing in the record to support this questionable premise. To the extent there is any information on this point, that information shows that most states implement placard programs, as well as other programs designed to open accessibility to persons with disabilities, without imposing any fee for such access. (*See* § B.1., *infra*.) The ADA sets a minimum floor of anti-discrimination standards. To the extent Petitioner suggests that states should be permitted to violate the ADA, lest they otherwise be discouraged from adopting (or withdrawing) measures that exceed that minimum floor, the suggestion should be rejected.

3. The Manageability Contention Is Unsupported

Petitioner argues without explanation or support that the prohibition of fees on access will extend the ADA beyond manageable bounds. The rule prohibiting such fees is clear and simple to apply. Petitioner has not even hypothesized how manageability problems could result

from the absolute prohibition on fees reflected in § 35.130(f).

4. Any Circuit Conflict Should Percolate

Petitioner notes the conflict between *Dare* and *Brown* over whether constitutional-abrogation issues are to be determined piecemeal or by examination of a Section 5 enactment as a comprehensive unit. But, as discussed more fully below, this doctrinal disagreement is too novel, too complex, and carries too many implications in too many cases to justify review at this time.

B. The Petition Does Not Raise Sufficiently Important Questions

As noted above, because the petition does not articulate compelling reasons, it should not be granted. *See* Sup. Ct. R. 10. Moreover, there are affirmative reasons why this petition should be denied.

The constitutionality of the abrogation of state immunities for suits under Title II of the ADA, *see* 42 U.S.C. § 12202, has, since the filing of the petition, become the subject of review by this Court. *University of Alabama at Birmingham Board of Trustees v. Garrett*, No. 99-1240, *on review from* 193 F.3d 1214 (11th Cir. 1999). However, Petitioner does not present this issue. Instead, Petitioner focuses narrowly on whether Congress has the power to prohibit states from requiring the beneficiaries of measures required under the ADA to pay for the costs of these measures.

1. Most States Do Not Impose Any Fee On Access

According to our research, the only systematic imposition of fees on measures affording access to persons with disabilities is the imposition of fees on the use of accessible parking placards.[1] However, most states do not currently impose placard fees. Some states no longer charge fees for placards as a result of legal challenges. *See, e.g., Thrope v. Ohio*, 19 F. Supp. 2d 816 (S.D. Ohio 1998). Colorado, Connecticut, and Nebraska have also been enjoined from collecting placard fees, but these injunctions are subject to review on appeal. *See Thompson v. Colorado*, 29 F. Supp. 2d 1226 (D. Colo. 1998) (appeal pending); *Duprey v. Connecticut*, 28 F. Supp. 2d 702 (D. Conn. 1998). To the best of our knowledge and research, no other state currently imposes fees on other measures necessary to afford accessibility.

The narrowness of this question is comparable to the primary issue in the petition in *Brown, petition filed* Sept. 8, 1999. The United States, which opposes the *Brown* petition, explained that the fee issue is too narrow to justify Supreme Court review:

> This case does not squarely present the broad question of whether the Disabilities Act reflects a proper exercise of Congress's Section 5 power.

---

[1] At oral argument before the Ninth Circuit, Petitioner contended that it could impose fees on ramps that allowed access to people who are unable to use stairs. We are unaware of any State which has actually imposed ramp fees, or other fees to cover the cost of providing access.

> Rather, it presents only the narrow and relatively infrequently recurring question of whether a particular Department of Justice regulation . . . as specifically applied to a limited category of state fees, can validly be enforced against the States in federal court by private parties. Accordingly, further review of this case is not warranted.

Brief of United States in Opposition to Petition for Writ of Certiorari review of *Brown* at 9.[2] Because the questions presented by Petitioner apply only to the shrinking minority of states that charge for measures affording access for persons with disabilities, the questions here are too narrow to justify review by this Court.

2. The Nonconstitutional Issues Presented Here Are Not In Dispute Among The Courts

Questions 2 and 3 challenge the Ninth Circuit's interpretation and application of the ADA and attendant regulations. These questions also are too narrowly focused to warrant consideration by this Court. Moreover, there is no conflict on this issue as the Ninth Circuit's finding that the ADA prohibits fees on placards that permit use of accessible parking is in accord with the ruling of every

---

[2] As further argued by the United States: "[T]he case presents only the question of whether the regulation as applied to the narrow circumstances presented here . . . falls within the Section 5 power. . . . The court of appeals' decision thus involved the distinctly limited question of whether a regulation as applied to a particular factual scenario fell beyond the Section 5 power. Such narrow rulings generally do not warrant an exercise of this Court's certiorari jurisdiction." *Id.* at 11.

other court that has reached a decision on this point. *See Thompson*, 29 F. Supp. 2d at 1229-1232; *Duprey*, 28 F. Supp. 2d at 705-711; *Thrope*, 19 F. Supp. 2d at 824-825; *McGarry v. Missouri Dep't of Revenue*, 7 F. Supp. 2d 1022, 1026-1029 (W.D. Mo. 1998), *vacated on other grounds*, (W.D. Mo. Jan. 31, 2000) (unpublished order); *Miller v. North Dakota Dep't of Transp.*, Case No. 96-C-1988 (Dist. N.D. 1997); *Keef v. State of Nebraska, Dep't of Motor Vehicles*, Docket 677 Page 536 (Dist. Ct. Lancaster Cty., Nebraska). Accordingly, there is no appellate or district court conflict that might justify review by this Court.

C. Controversy Regarding The Applicability Of Brown's Fourteenth Amendment Analysis Is Not Sufficiently Mature

There is a conflict between the Fourth and Ninth Circuits on whether Congress's abrogation of Eleventh Amendment immunity was appropriate as to 28 C.F.R. § 35.130(f), which prohibits imposition of fees to cover measures required by the ADA. The conflict arises from the Fourth Circuit's unique reasoning that inquiry as to the propriety of abrogation of Eleventh Amendment immunity may be had on a regulation-specific basis. This "narrow focus" doctrine holds that the particular regulation upon which a claim is asserted must be found to be within Congress's Section 5 power, without regard to whether the legislative enactment taken as a whole is within that power. *Brown*, 166 F.3d at 703-704. The Ninth Circuit considered and rejected the Fourth Circuit's narrow focus approach, *Dare*, 191 F.3d at 1175-1176, but no other published decision carefully examines this question.

The complexity and novelty of this issue are such as to require that jurisprudence be supplemented by development of additional case law, as augmented by academic comment, before deciding the point.

1. The Issue Is Novel

This Court has been properly hesitant to reach questions prematurely. "Wise adjudication has its own time for ripening." *Singleton v. Commissioner*, 439 U.S. 940, 943 (1978) (Stevens, J., respecting denial of certiorari) (quoting *Maryland v. Baltimore Radio Show*, 331 U.S. 912, 917-919 (1950) (Frankfurter, J., regarding denial of certiorari)). The use of a regulation-specific analysis in determining whether Congress has effectively abrogated state immunities occurred for the first time in February of 1999, in the Fourth Circuit's decision in *Brown*. Since then, the *Brown* approach has been meaningfully addressed only in footnotes in this case below.

2. The Issue Is Complex

The complexity of the question also justifies awaiting the development of a larger body of decisional authorities or commentary. This complexity can be illustrated by a short review of the arguments against the Fourth Circuit's approach, as raised here by Petitioner.

a. The *Brown* Court's Approach Is Inconsistent With Precedent

In examining whether Congress has confined itself to remedial lawmaking, or has instead attempted to redefine constitutional protections, this Court has instructed:

> While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.

City of Boerne, 521 U.S. at 530. The test of congruence contemplates weighing the "measures" as cumulatively enacted against the "evil presented." This assigns a balancing test of means and ends; it does not call for pinpoint examination of whether any particular measure embodied in an enactment containing many measures can be justified in terms of remedying any one of the evils presented.

City of Boerne instructs that it is the Congressional enactment, as a whole, which must be weighed against the inequity to be remedied. The ADA's recitation of the historical sufferings of persons with disabilities demonstrates that the "evil presented" is patent and historic, and warranted redress by Congress. Indeed, Congress' detailed approach was heralded by the Supreme Court's opinion in *Cleburne*.

> How this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators

> guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary.

Cleburne, 473 U.S. at 442-443. The rational relationship standard of review for disability classifications adopted in *Cleburne* was intended to encourage flexibility in legislative efforts to assist people with disabilities. *Id.* In contrast, *Brown*'s standard of pinpoint scrutiny effectively would deter legislative ingenuity on behalf of people with disabilities and usurp the legislative function, requiring courts to police the constitutionality of statutory and regulatory schemes, regulation by regulation.

Brown's narrow-focus approach would create the judicial equivalent of the line item veto legislation rejected in *Clinton v. City of New York*, 524 U.S. 417 (1998). The power to cancel portions of a law, rather than the law in toto, was recognized as sizably (and improvidently) enhancing the authority of the President at the expense of the Congress. *Id.* at 449-452 (Kennedy, J., concurring). Similarly, the narrow-focus review suggested by *Brown* would unduly augment the judicial authority at the expense of the elected branches. *Dare*, 191 F.3d at 1176 n.7.

Brown's approach also conflicts with the deference owed to Congress when reviewing laws enacted pursuant to Section 5. *See, e.g., City of Boerne*, 521 U.S. at 508 ("line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies"). It is the judiciary's province to determine whether Congress has embarked upon a mission which is

within the concerns of the Fourteenth Amendment, and whether Congress has done so through means reasonably designed to further this mission. It does not follow that every portion of an enactment can be subject to independent attack, or that the judiciary is empowered to examine the wisdom of the details of legislation.

b. The *Brown* Approach Will Multiply Litigation By Destroying The Precedential Value Of Decisions Upholding Or Rejecting The Constitutionality Of Congressional Abrogations

Secondly, but of no less concern, daunting administrative problems arise from *Brown*'s approach, which limits any abrogation precedent to the precise facts and claim presented. The decisions in *Muller v. Costello*, 187 F.3d 298 (2d Cir. 1999); *Martin v. Kansas*, 170 F.3d 1305 (10th Cir. 1999); *Kimel v. Florida Bd. of Regents*, 139 F.3d 1426 (11th Cir. 1998), *vacated in part on other grounds*, 120 S. Ct. 631 (2000); *Coolbaugh v. Louisiana*, 136 F.3d 430 (5th Cir. 1998), *cert. denied*, 525 U.S. 819 (1998); and *Clark v. California*, 123 F.3d 1267 (9th Cir. 1997), each unconditionally uphold the ADA's abrogation of state immunities. Under these rulings, federal district courts in the Second, Fifth, Ninth, Tenth, or Eleventh Circuits are bound to deny motions to dismiss ADA cases on Eleventh Amendment grounds. Certainty prevails in the Seventh and Eighth Circuits as well, where *Alsbrook* and *Erickson v. Board of Governors*, 2000 U.S. App. LEXIS 5074 (7th Cir. March 27, 2000), clearly bar any Title II claim against a State in federal court.

In stark contrast, due to the narrow focus of *Brown*'s limited rejection of Congressional abrogation of the Eleventh Amendment, the Courts within the Fourth Circuit must examine and decide every Eleventh Amendment assertion afresh under the particular facts and legal claims asserted. Precedent can be of little value under the *Brown* approach because cases will always present distinguishing features when the focus is so close. Because every Eleventh Amendment dismissal and every denial of such a motion to dismiss is appealable, *see Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139 (1993), every such ruling will generate an appealable issue. *Brown*'s approach turns on its head the dictate that litigation concerning the court in which a suit may be filed should be crafted, where possible, to avoid extensive threshold litigation over jurisdiction. *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 464 n.13 (1980). Contrary to this wisdom, the *Brown* approach fosters litigation which will require the extravagant allocation of resources on threshold jurisdictional questions. The narrow-focus analysis thus threatens to grievously multiply the burden on litigants and courts in having to repeatedly grapple with difficult abrogation questions.

c. Narrow Focus Is Not Required By Rules Of Constitutional Construction

Petitioner argues that narrow-focus review is required by canons of constitutional construction, which discourage constitutional rulings broader than necessary to the case presented. These canons arise in part from the prudential view that constitutional rulings should not be

chiseled into our jurisprudence unless necessary to decide a dispute. These canons are also a product of the nature of judicial power – the power to resolve disputes, but not step beyond the confines of such disputes to make unnecessary declarations of law.

Viewed in this manner, the canons relied upon by Petitioner operate to restrict the exercise of judicial power. It would misapply these canons to use them to restrict Congress' substantive power to legislate, while allowing the courts (in a legislative fashion) to selectively uphold or cancel individual components of legislation that, viewed as a whole, are within the scope of the Section 5 power.

* * *

Resolution of the disagreement between the Ninth and Fourth Circuits requires a resolution of how to determine whether Congress has acted within its Section 5 authority: whether to focus on the law enacted as a whole, or upon any specific regulation implicated by the facts at issue. Because this question is both novel and complex, and because it carries weighty implications extending to all causes of action created by Congress under Section 5 of the Fourteenth Amendment, the matter should not be reached too soon. Instead, it is respectfully submitted that this Court should await the development of additional decisional law and academic comment, so that a fuller body of jurisprudence will be available to guide the resolution of the question when the question is reached.

D. Only Injunctive Relief Has Been Entered

To date, Respondents have been afforded only injunctive relief. This form of relief is obtainable in federal court under *Ex parte Young*, 209 U.S. 123, 155-156 (1908), regardless of whether the ADA abrogated Eleventh Amendment immunity. Thus, a decision on the Eleventh Amendment issue now, given the current procedural status of this case, would answer only the question of whether suit must be against an officer of The Department of Motor Vehicles rather than the Petitioner itself.

E. Ninth Circuit's Rulings Are Correct

Most of the pages of the Petition are dedicated to arguing the merits. To the extent, if any, that the purpose of certiorari review is to correct error, that purpose would not be served here.

1. Congress May Prohibit Fees On Access

The wisdom of the Ninth Circuit's refusal to follow *Brown*'s narrow focus approach to abrogation issues is demonstrated at Section C, *supra*. Even if a narrow focus should be applied, that analysis will demonstrate that the prohibition of fees on access is within Congress's Section 5 authority.

a. The Fee Prohibition Serves The Purposes Of Section 5

The access fee prohibition is constitutionally related to the Fourteenth Amendment's purpose of deterring disability discrimination:

> All § 35.130(f) really stands for, then, is the unspectacular proposition that a state may not recover from victims of discrimination the cost of ending discrimination against those victims.

Brown, 166 F.3d at 708 (Murnaghan, J., dissenting). *See also Dare*, 191 F.3d at 1176. It is the Petitioner's proposition that is spectacular, *i.e.*, that it is appropriate to recoup ADA compliance costs from those whose disabilities require remediation and who, because of the discrimination they have suffered, are least able to pay it. *See* 42 U.S.C. § 12101(a)(6); Sen. Bob Dole, *Are We Keeping America's Promises to People With Disabilities – Commentary on Blanck*, 79 Iowa L. Rev. 925, 928 (1994).

The prohibition against fees on access is an essential protection for rights of access. To slightly rephrase Chief Justice Marshall's aphorism, the power to charge a fee on access is the power to destroy the right of access.[3] It

---

[3] "That the power to tax invokes the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government the constitutional measures of another, which often, with respect to those measures, is declared to be supreme over that which exerts the control, are propositions not to be denied." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). *See also Murdock v. Pennsylvania*, 319 U.S. 105 (1943) ("power to tax the exercise of a privilege is the power to control or suppress its enjoyment").

follows that Congressional power to mandate accessibility (which Petitioner does not challenge) reasonably includes the power to prohibit any exaction which may burden that access.

b. Placard Fees Are Facially Discriminatory

Any fee system that targets the victims of discrimination for special assessments to cover the costs of remedying the wrongs will itself constitute invidious discrimination:

> It makes no more sense to allow states to recoup from the disabled the costs of providing the remedial programs needed to fully integrate them into society than it would, for example, to permit universities receiving federal funding to charge women higher tuition rates to cover the costs of complying with Title IX of the Civil Rights Act of 1964. The goal is to help the victims of discrimination, not to heap more discriminatory treatment upon them.

Brown, 166 F.3d at 709-710 (Murnaghan, J., dissenting). *See also Dare*, 191 F.3d at 1171 ("surcharges against disabled people constitute facial discrimination"). Equal employment opportunity laws, voting rights laws, and possibly every other Section 5 enactment that applies against state governments also impose substantial costs over time to the states. The arguments presented by Petitioner would effectively give the states limitless authority

to recoup these costs by fees imposed solely on the protected classes.

Special assessments targeting only persons with disabilities, or only women, or only African-Americans, are discriminatory on their face. In legislating against discrimination, Congress surely is not impotent to forbid assessments that uniquely target the protected class.

2. *Dare* Is Consistent With *Kimel*

Petitioner argues that this Court's decision in *Kimel* compels reversal. This is not the case. Grounds for distinguishing the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621, et seq. ("ADEA") from the ADA appear initially in *Kimel*'s review of the reasons why Congress has limited power to address differential treatment on account of age: (1) age classifications are often relevant to legitimate state interest; (2) older persons have not been subjected to a history of purposeful unequal treatment; and (3) the elderly do not constitute a discrete and insular minority because everyone will experience old age if they live their normal life spans. *Kimel*, 120 S. Ct. at 645. These points do not translate to the area of disability discrimination.

First, one express purpose for declining to apply heightened scrutiny in *Cleburne* was to allow for laws, like the ADA, designed to assist persons with disabilities:

> How this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary.

> Heightened scrutiny inevitably involves substantive judgments about legislative decisions, and we doubt that the predicate for such judicial oversight is present where the classification deals with mental retardation.

Cleburne v. Cleburne Living Center, 473 U.S. 432, 442-443 (1985). *Cleburne* cites laws such as the Rehabilitation Act of 1973, 29 U.S.C. § 794, as examples of the kinds of laws which should be given deference by the courts. The refusal to accord heightened scrutiny for disability classifications was designed to encourage legislative ingenuity on behalf of this disadvantaged group, and it would defeat this purpose to shackle the most important example of such legislative efforts. *See* Ruth Colker, *The Section Five Quagmire*, 47 UCLA L. Rev. 653, 689-693 (2000).

Second, there is no doubt that persons with disabilities have been subjected to a history of discriminatory treatment. As found by Congress: "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2). *See also Cleburne*, 473 U.S. at 461. (Marshall, J., concurring in part and dissenting in part.) Finally, it is not necessarily or even usually the case that people live long enough to become disabled.

Thus, each of *Kimel*'s reasons for limiting Congressional power to confront state age discrimination is absent here. Moreover, *Kimel*'s conclusion that most differential treatment on the basis of age would be constitutionally permissible suggests that a ban on age

discrimination in state employment would be incongruent. But it is not established that most discrimination on the basis of disability is constitutionally permissible, and *Kimel* therefore does not control the question of Congressional power to confront state disability discrimination.

In addition, this Court has never held that Congress is barred from "reasonably prophylactic legislation," as long as the remedy is found appropriate, based in part upon a review of the legislative record. *Kimel*, 120 S. Ct. at 648. While the ADEA's legislative record provided no evidence of "any discrimination whatsoever that rose to the level of constitutional violation," *id.* at 649, the record with respect to the ADA is markedly different.

Congress found that persons with disabilities have suffered a historical, pervasive and continuing pattern of discrimination, including segregation and exclusion from public services and benefits, causing them to occupy a disadvantaged position in society. Isolation, segregation, exclusion, and other discriminatory treatment have been suffered in such areas as housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services. 42 U.S.C. § 12101(a). The problems of disability discrimination recounted in the ADA were not uprooted despite decades of more limited legislative efforts to control such forms of discrimination.[4]

---

[4] *See generally Heather K. v. City of Mallard, Iowa*, 887 F. Supp. 1249, 1263-1265 (N.D. Iowa 1995); Robert Burgdorf, Jr., *The Americans With Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 Harv. C.R.-C.L. L. Rev.

These facts place the ADA on constitutionally sound footing, and distinguish it from the ADEA. *Dare*, 191 F.3d at 1174 n.3 (citing authorities).

3. Accessible Parking Is An ADA Mandate

Petitioner's arguments (Pet. 17-20) mistakenly assume that Respondents' claims depend upon placards themselves being required by the ADA. Respondents' claims are grounded on the right to use accessible parking, rather than on a right to enforcement of state parking laws. *See* 28 C.F.R. §§ 35.130(b)(4), 35.149, 35.150, 35.15(c); *ADA Accessibility Guidelines for Buildings and Facilities*, 28 C.F.R. Ch. I pt. 36, App. A., §§ 4.1.2, 4.3, 4.6. The ADA violation was triggered by the Petitioner's application of State police power to prevent people with disabilities from using accessible parking unless they paid the Petitioner's price. This charge is a facially discriminatory fee on access.

---

413 (1991); Lowell P. Weicker, Jr., *Historical Background of the Americans With Disabilities Act*, 64 Temp. L. Rev. 387 (1991). In deciding whether Congress had a sufficient basis for enacting the ADA under Section 5, it will be necessary to consider their accumulated experience from these many other disability rights enactments. For example, from the legislative history of laws focusing on disability discrimination by public school systems, Congress knows that children with disabilities have been excluded from educational opportunities given to other children. *See Little Rock Sch. Dist. v. Mauney*, 183 F.3d 816, 825 (8th Cir. 1999).

4. USPPD Does Not Allow Placard Fee

Petitioner's final argument is built from Public Law 100-641 (1988), and the Uniform System for Parking for Persons with Disabilities, 23 C.F.R. § Part 1235 ("USPPD"). The argument that these provisions authorize placard fees has been rejected by all courts addressing the issue because: (1) the USPPD does not invest authority to require a placard fee; and (2) if the USPPD granted such authority, it has since been countermanded by the ADA. *See Dare*, 191 F.3d at 1172; *Thompson*, 29 F. Supp. 2d at 1229-1231; *Duprey*, 28 F. Supp. 2d at 711; *McGarry*, 7 F. Supp. 2d at 1026-1027.

a. USPPD Does Not Authorize Placard Fee

Placard fees are not mentioned in the USPPD or Public Law 100-641.[5] Petitioner argues that it has been

---

[5] *Thompson*, 29 F. Supp. 2d at 1231; *McGarry*, 7 F. Supp. 2d at 1027. The only mention of placard fees is the Advisory Committee report statement that: "Committee believes that the states should be permitted to exercise administrative discretion in determining the size, renewal period and fees for . . . placards." 56 Fed. Reg. 10328, 0344 (1991). The remark must be understood in its pre-ADA context. Most of the Advisory Committee's work was completed before the ADA was enacted, and the USPPD was promulgated before the Title II regulations issued. Viewed in this historical context, the Advisory Committee merely noted and withheld from abridging the pre-ADA power of the States to charge fees on access. At any rate, the report of the USPPD Advisory Committee should be given little weight. *Cf. Pulley v. Bowen*, 817 F.2d 453 (7th Cir. 1987) (Social Security Program Operations Manual could not be used in interpreting statute because not formally adopted as a regulation).

implicitly authorized to impose placard fees because the USPPD does not preclude a placard fee, but does prohibit any extra fee on access plates. Had Congress intended to authorize the States to charge for placards, it would have done so directly, and not by silence. The USPPD presents no impediment to determining that the subsequent prohibition against fees on access in the ADA applies. *See Thompson*, 29 F. Supp. 2d at 1230 ("the two statutes do not contain conflicting mandatory directives to the states"); *McGarry*, 7 F. Supp. 2d at 1027.

Nor do the purposes of the USPPD require a placard fee. The stated goal of the USPPD was not access, but safety.[6] Public Law 100-641 did not mandate, but merely encouraged, adoption of a uniform system for identifying vehicles serving people with disabilities which the States were free to reject. The USPPD is thus akin to a model code, setting forth guidelines which any state might choose to adopt, but not be compelled to follow. 23 C.F.R. § 1235.1 (1996). *See Dare*, 191 F.3d at 1172; *Duprey*, 28 F. Supp. 2d at 711; *McGarry*, 7 F. Supp. 2d at 1027.

---

[6] Public Law 100-641 § 3(a)(1) & (b)(1). People with disabilities may be less able to avoid vehicles and more likely to stumble and injure themselves falling. In addition, wheel chair users are lower and more difficult to see than persons who walk; a driver who is about to back out of a parking space might not realize that there is someone in a wheel chair right behind. These safety problems are largely resolved by accessible parking so that people with disabilities need not traverse the parking area.

b. ADA Overrides USPPD

Even if the USPPD authorized placard fees, the ADA would control. First, the ADA preempts laws which provide lesser protections. Second, the broad goals of the ADA require this result. Third, the ADA is the later enacted statute. Finally, the Advisory Committee had no authority to make any determinations of rights under the ADA. *Accord McGarry*, 7 F. Supp. 2d at 1027 ("DOJ regulations prohibiting charges for benefits supersede any conflicting DOT regulations").

i. ADA Preempts Less Protective Laws

The ADA precluded all less protective laws to the extent they fail to fulfill the mandates of the ADA. *See Danfelt v. Board of County Commissioners*, 998 F. Supp. 606, 611 (D. Md. 1998); *Devlin v. Arizona Youth Soccer Ass'n*, 1996 U.S. Dist. LEXIS 12368 (D. Ariz. 1996). Congress included 42 U.S.C. § 12201(b) to preserve only laws offering greater or equal protections. Without Section 12201(b) the comprehensive reach of the ADA would have suggested that Congress intended to preempt the field entirely. *See Ellenwood v. Exxon Shipping Co.*, 984 F.2d 1270, 1277 n.9 (1st Cir. 1993). Section 12201(b) defeats Petitioner's argument that it may impose fees on accessible parking, because any right to charge for access would curtail rights afforded under the ADA.

ii. Broad Goals Of The ADA Require Revocation Of Fees On Access

The ADA was designed to integrate persons with disabilities into the American mainstream by guaranteeing a panoply of rights that remove obstacles to their participation in American society. *See generally* 42 U.S.C. § 12101(a); *Helen L. v. Didario*, 46 F.3d 325 (3d Cir. 1995), *cert. denied*, 516 U.S. 813 (1995); *Heather K.*, 887 F. Supp. at 1263-1266. Any facially discriminatory fee on access is contrary to the goals of the ADA. As provided by 28 C.F.R. § 35.130(f):

> A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

This provision recognizes that there will be sizable costs associated with removing barriers and other vestiges of disability discrimination but that these costs must be carried upon all shoulders, and not covered by exactions which fall solely on persons with disabilities.[7] *See Martin*

---

[7] As illustrated by the Technical Assistance Manual: "ILLUSTRATION: A community college provides interpreter services to deaf students, removes a limited number of architectural barriers, and relocates inaccessible courses and activities to more accessible locations. The college cannot place a surcharge on either an individual student with a disability (such as a deaf student who benefits from interpreter services) or on groups of students with disabilities (such as students with

v. Kansas, 170 F.3d 1305, 1307 (10th Cir. 1999); *Thrope*, 19 F. Supp. 2d at 819.[8]

That the rights afforded by the ADA include accessible parking should be uncontroversial. *McGarry*, 7 F. Supp. 2d at 1028. In contrast, the more limited goals of the USPPD (*see* n.6, *supra*) are in no way disserved by the access fee prohibition. Where separate acts of Congress are arguably inconsistent, but may be construed so that the goals of each may be achieved, such a construction is favored. *See Morton v. Mancari*, 417 U.S. 535, 551 (1974). There is no need to reach the strained interpretation proffered by Petitioner in order to force unnecessary conflict between these provisions.

iii. ADA Controls Over Pre-ADA Laws

If the USPPD authorizes placard fees, then a conflict is created between this alleged authorization and the ADA. Where there is a conflict between earlier and later enacted statutes, the later statute governs. *Cheffer v. Reno*, 55 F.3d 1517, 1522 n.10 (11th Cir. 1995).

---

mobility problems who benefit from barrier removal). It may, however, adjust its tuition or fees for all students." *The Americans with Disabilities Act Title II Technical Assistance Manual* at II-3.5400 (Nov. 1993).

[8] The rule prohibiting discriminatory fees for measures required by the ADA is necessary both because the costs of ADA compliance are high, and because persons with disabilities are one of the most impoverished groups in the nation. 42 U.S.C. § 12101(a)(6); Dole, 79 Iowa L. Rev. at 928. In large part, this general impoverished condition of persons with disabilities is a product of the history of discrimination they have suffered. 42 U.S.C. § 12101(a)(2), (5), (7), & (9).

iv. Advisory Committee Had No Authority To Interpret The ADA

Congress gave authority to interpret Title II to the Attorney General, not the USPPD Advisory Committee. 42 U.S.C. § 12134. Deference to the ADA's regulations is appropriate because Congress delegated this task to the Attorney General. *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990). On the other hand, because the Advisory Committee was not entrusted to interpret the ADA, its remarks bear no weight in determining ADA rights. *Id.* Therefore, even if there is conflict between agency interpretations, the Title II regulations control.

CONCLUSION

As reviewed above, there are many reasons to deny the petition here presented. A review of the various points asserted in the petition demonstrate that Petitioner has failed to satisfy the burden it must carry to obtain review by this Court, and that the petition should be denied.

RESPECTFULLY SUBMITTED this 25th day of April, 2000.

DAVIS WRIGHT TREMAINE LLP
Attorneys for Respondents

ANDREW R. HALL
California SBN 125773
ELIZABETH STAGGS-WILSON
California SBN 183160
865 S. Figueroa Street, Suite 2400
Los Angeles, CA 90017-2566
(213) 633-6800

ANTONELLO FEGERS & CEA
ROBERT ANTONELLO
Florida Bar No. 0259977
ROBERT G. FEGERS
Florida Bar No. 379719
P.O. Box 7692
Winter Haven, FL 33883
Telephone: (863) 294-2898

(3)

Supreme Court, U.S.
FILED
MAY 09 2000
CLERK

No. 99-1417

In The

Supreme Court of the United States

STATE OF CALIFORNIA,
DEPARTMENT OF MOTOR VEHICLES,

Petitioner,

v.

WILLIAM ROBERT DARE AND GARY PETILLO,
individually and on behalf of others similarly situated,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

BILL LOCKYER,
California Attorney General
DAVID CHANEY,
Senior Assistant Attorney General
SILVIA M. DIAZ,
Supervising Deputy Attorney General
MICHELLE LOGAN-STERN,
Deputy Attorney General
*ANGELA SIERRA,
Deputy Attorney General
California Department of Justice
300 South Spring Street
Los Angeles, California 90013
Telephone: (213) 620-6312

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

5 pp

REPLY BRIEF FOR PETITIONER

Petitioner agrees with respondents that permeating the Petition is the question of whether a constitutional challenge is limited to a federal enactment as a whole or whether a challenge may be brought against a particular regulation designed to enforce a federal enactment. In *Dare v. State of California Department of Motor Vehicles*, 191 F.3d 1167, 1173, n.2 (9th Cir. 1999), Appendix 11, n.2, the Ninth Circuit Court of Appeal stated that "regulations do not receive an independent constitutional assessment" and refused to consider whether the regulation constituted an improper abrogation of state sovereignty as held in *Brown v. North Carolina Division of Motor Vehicles*, 166 F.3d 698 (4th Cir. 1999), *petition for cert. filed* (August 8, 1999) (99-424). In support of its holding in *Brown*, the Fourth Circuit Court of Appeal stated that "[f]ocusing only upon the statute and ignoring the regulation would artificially hinge the weighty structural protections of state sovereign immunity upon a congressional choice of rulemaking efficacy." (*Id.* at 704.)

The conflict of law between the Ninth and Fourth Circuits is highly controversial and ripe for review. This is demonstrated by the fact that petitions for certiorari have been filed in both *Dare* and *Brown*. Interestingly, counsel for respondents here are also counsel for petitioners in *Brown*. In that petition they state: "The Fourth Circuit's decision . . . merits review because the panel decided an important federal question in a way that conflicts with relevant decisions of this Court, and that conflicts with the decisions of other courts of appeals." (Petition for Certiorari at 4, *Brown v. North Carolina Division of Motor Vehicles*, 166 F.3d 698 (4th Cir. 1999) (99-424).)

The split between the Fourth and the Ninth Circuits creates an intolerable conflict which the appellate courts will not be able to resolve themselves. Depending on geographical location, certain states will have more constitutional protection than others. Either the appellate court will allow a state to challenge the constitutionality of a regulation independent of the underlying enactment or it will not. A compelling need exists for a uniform rule on this point. This is a controversy that only the United States Supreme Court can resolve.

Petitioner also agrees with respondents that the dismissal of the *Alsbrook v. City of Maumelle*, 684 F.3d 825 (8th Cir. 1999), *cert. granted in part by* 120 S.Ct. 1003 (January 25, 2000) (99-423) *cert. dismissed* (March 1, 2000), petition makes moot the relationship between the issues in *Alsbrook* and the issues in *Dare* for the purpose of granting the *Dare* petition. However, the issues in *University of Alabama Bd. Of Trustees v. Garrett*, 193 F.3d 1214 (11th Cir. 1999) *cert. granted in part* (99-1240), though sufficiently broad to subsume the issues raised here, will not necessarily do so. Unless this Court determines that Title II of the Americans With Disabilities Act is an improper abrogation of state sovereignty, the controversy between the Fourth and Ninth Circuit will remain a festering conflict, depriving certain states of the constitutional protections provided to others. In the event that this Court determines that Title II is constitutional in its review of *Garrett*, the more narrowly-framed issues raised in the *Dare* petition remain highly relevant to protecting state sovereignty.

Petitioner disagrees with respondents' contention that, in light of *Ex parte Young*, the only question that will

be answered if the petition for certiorari is granted is "whether suit must be against an officer of the Department of Motor Vehicles." (Respondents' Brief at 15.) The constitutionality of state policy and the actions of state officials outside the context of Congress's attempt to abrogate state sovereignty has not been pleaded and is not before this Court.

Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), permits, in certain circumstances, a party to pursue a claim in federal court to enjoin a State officer from enforcing an unconstitutional State policy. (*See id.*; *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997) (Kennedy, J., majority).) However, *Young* is not applied to every conceivable circumstance and respondents make no showing that this case meets the criteria necessary to apply the *Young* exception to petitioner's sovereign immunity. (*See, e.g.*, *Coeur d'Alene, supra*, 521 U.S. 261; *Edelman v. Jordan*, 415 U.S. 651, 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); *Pennhurst State School v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984).) Thus, a decision by this Court will not answer a question that was never asked.

CONCLUSION

The petition should be granted.

Dated: May 9, 2000

Respectfully submitted,

BILL LOCKYER,
Attorney General
DAVID CHANEY
Senior Assistant Attorney General
SILVIA M. DIAZ
Supervising Deputy Attorney General
MICHELLE LOGAN-STERN
Deputy Attorney General
ANGELA SIERRA
Deputy Attorney General
Attorneys for Petitioner